Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

CHARLES CRISSMAN and WENDY CRISSMAN,

Petitioners,

v.

DOVER DOWNS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners Charles Crissman and Wendy Crissman are Delaware horsemen whose livelihood is the training and harness racing of horses. It is undisputed that Petitioners were excluded without hearing or explanation from Dover Downs, a harness racing track located in Dover, Delaware, in 1997, and that they have been excluded ever since.

The question presented is whether the actions of a nominally private entity, Dover Downs, Inc., operating in a joint venture/partnership with the State of Delaware, constitute State action for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The District Court's opinion and order (per McKelvie, D.J.) granting Respondent's Summary Judgment Motion (Appendix ("Pet.App.") 79a-92a) was unpublished. A panel of the Third Circuit Court of Appeals unanimously reversed the summary judgment order and ordered the granting of Petitioner's preliminary injunction. (*Id.* 60a-77a). The panel decision denying Dover Downs' Motion for Reargument is found at 53a to 59a of the Appendix. The Third Circuit decision granting a rehearing *en banc*, and vacating the panel's two decisions referenced *supra* (*id.* 51a - 52a) is published at 254 F.3d 467. The Third Circuit's opinion *en banc* (Pet.App. 1a-48a) is published at 289 F.3d 231.

STATEMENT OF JURISDICTION

The Court of Appeals entered its final order on April 30, 2002. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Selected provisions of the Delaware statutes creating Delaware's video lottery system relevant to this Petition are reprinted in the Appendix at 93a-112a, as well as portions of the statutes tying Delaware's harness racing system to that video lottery.

STATEMENT OF THE CASE

Petitioners Charles Crissman and Wendy Crissman ("Petitioners") are licensees in good standing with the Delaware State Harness Racing Commission and race standardbred horses as their sole occupation. On November 5, 1999, the Petitioners filed a complaint pursuant to 42 U.S.C. § 1983, alleging *inter alia* that Respondent Dover Downs, Inc. ("Respondent"), had violated their Fourteenth Amendment right to due process by excluding them from the Dover Downs racetrack and casino facility in Dover, Delaware, and preventing them from racing for the six months each year in which Dover Downs is the only facility conducting harness racing within the State of Delaware. In addition to permanent relief, Petitioners sought a preliminary injunction against Respondent to prevent Respondent from excluding them from its facility. At the focus of Petitioners' complaint was Respondent's joint venture/partnership with the State of Delaware to run a state "video lottery operation" in conjunction with a harness racing operation.

The record before the District Court established that although Petitioners were licensees in good standing with the Delaware State Harness Racing Commission ("the HRC"), Respondent had excluded them from racing at its facility without any process whatsoever, thus violating their Fourteenth Amendment rights. Petitioners had sought a preliminary injunction to permit them to continue to race at Dover Downs, while Respondent had filed a cross motion for summary judgment. After supplementing the record with limited discovery and some stipulated facts, the District Court granted Respondent's summary judgment motion. The District Court held that Respondent, despite its status as

a joint venturer/partner with the State of Delaware, was not a "state actor" for purposes of Section 1983. In fact, the District Court ignored Delaware's, at the time, unique statutory scheme for running a state "video lottery" and characterized the system as one involving nothing more than regulation by the State paired with the State's receipt of revenue from the private entity.

Petitioners timely appealed to the Third Circuit Court of Appeals. Oral argument was held and a panel of the Third Circuit unanimously held that Respondent was a state actor, and reversed the decision of the District Court, remanding the case with directions for the District Court to grant Petitioners' preliminary injunction permitting them to race. The unanimous panel held that the partnership created a symbiotic relationship as a matter of statutory expression and that this Delaware scheme was far more compelling than the facts in *Burton* (Pet.App.67a). Accordingly, the panel held that because of the undisputed statutory system created in Delaware to establish a joint state/private profit-making gambling business, the State of Delaware and Respondent were joined in a "symbiotic relationship." (Pet.App.70a).

Subsequently, Respondent filed a Petition for Rehearing. This Court then issued its decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). After examining arguments regarding *Brentwood*, the panel unanimously denied the Petition in a June 5, 2001 decision, which is found at Appendix C. (Pet.App. 53a - 59a). The Third Circuit, however, granted a rehearing *en banc*, which was held on November 28, 2001, and vacated the panel's two decisions. (Pet.App. 51a -52a).

In an April 30, 2002 decision, the Third Circuit *en banc* affirmed the District Court's granting of summary judgment. The majority, as well as the dissent, recognized that under Delaware's state lottery system, based on the statutory system tying horse racing to the State's video lottery operations, Respondent's harness racing and video lottery activities could not be separated for purposes of state action analysis. (Pet.App. 10a, 41a). Nevertheless, the majority held that Respondent could not be considered a state actor, primarily because this case did not satisfy the factual requirements of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Moreover, the majority held, *inter alia*, that for an activity to be held fairly attributable to the State, the State must be involved in the challenged activity. (Pet.App. 18a).

The dissent (authored by Judge Rosenn) recognized that when a state chooses to become a joint venturer or partner with a nominally private entity for the purposes of profit making rather than merely regulating an activity, actions taken by the nominally private actor are "fairly attributable to the state". The dissent asserted that the "interdependant relationship" that the State had established with Respondent, which constituted a "deliberate entwining and interdependence between the State and [Respondent]," "far more impressively support[ed] state action" than did the facts in *Burton*. (Pet.App. 35a, 37a, 38a).

REASONS FOR GRANTING THE WRIT

The Petition should be granted for two reasons. *First*, the court below decided an important question of federal law that has not been, but should be, settled by this Court. The court below refused to recognize that in a situation where the State and a nominally private entity jointly conduct a

video lottery operation created by state statute, this creates an interdependent relationship arising from a partnership or joint venture between the State and the nominally private entity that renders the nominally private entity a state actor for purposes of the Fourteenth Amendment and Section 1983.

Second, the decision of the court below conflicts with a decision of this Court because it imposes an absolute condition for a finding of state action, namely, that the State must have been involved with the challenged activity, though this Court said in *Brentwood* that such placing of conditions was not permissible in determining whether state action was present in a particular factual situation. Moreover, the court below has wrongly interpreted language by this Court in *Brentwood* — namely, "that state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself'" — to mean, again, that the State must be involved in the challenged activity in order for state action to be present. *Brentwood*, 531 U.S. at 295 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 n.2 (1974)). Such a conclusion, however, would eviscerate the symbiotic relationship test announced by this Court in *Burton* in a way not intended by this Court.

I. The Court Below Has Decided An Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court, Namely, Whether The Joint Operation Of A Video Lottery By The State And A Private Entity Creates A Form Of Entwinement Rendering The Actions Of The Private Entity State Action For Purposes Of The Fourteenth Amendment And 42 U.S.C. § 1983.

In *Brentwood*, this Court recognized that the exercise of distinguishing between State action and private conduct for purposes of the Fourteenth Amendment and Section 1983 is not to be a rigid one subject to formalized tests and requirements. This Court also recognized that every factual situation is to be examined independently to determine whether State action can be ascribed to a nominally private entity for purposes of those provisions. "If the Fourteenth Amendment is not to be displaced, its ambit cannot be a simple line between States and people operating outside formally governmental organizations. . . ." 531 U.S. at 295. As the Court further explained,

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Id. at 295-296.

The factual scenario set forth in this case — where the State of Delaware and a private corporation, Dover Downs, Inc., have entered into a partnership or joint venture to conduct a video lottery operation — creates a highly unusual, and highly compelling, interdependent relationship rendering the exclusion of Petitioners by Respondent's state action. While highly unusual, however, this type of relationship is not unique, and it threatens to become far more widespread as a result of the Third Circuit's decision in this case. Indeed, Harness Tracks of America, an *amicus curiae* in the proceedings below, represented to the court below that

> [a]lthough at the present time only a small number of racetracks in the United States and Canada currently have video lottery terminals or other alternative forms of gaming, the concept is of substantial interest to the pari-mutuel racing industry as a whole, and a number of states have already commenced or authorized such gaming at racetracks and other locations.

Therefore, this unsettled federal question is of vital interest to the nation as a whole, since an increasing number of States are likely to set up such state/private gambling partnerships, particularly now that the Third Circuit – the first circuit to determine whether such a relationship gives rise to state action – has determined that nominally private members of such partnerships need not operate under constitutional restraints.

The court below wrongly characterized the relationship between the State of Delaware and Dover Downs as a primarily regulatory relationship or as an example of state subsidization of a private entity. Pet.App. 24a. Such an

assessment, however, ignores the undisputed facts regarding this relationship. The court failed to recognize that, far from being a relationship dominated by mere regulation of revenue flow, the relationship between Delaware and Respondent is a statutorily-created partnership or joint venture, which this Court recognized to be capable of giving rise to state action by a private entity for purposes of the Fourteenth Amendment. *See Moose Lodge No. 7 v. Irvis*, 407 U.S. 163, 175 (1972) (detailed regulation of Moose Lodge by State of Pennsylvania through Pennsylvania Liquor Control Board could not be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise).

In 1993, the State of Delaware enacted the Horse Racing Redevelopment Act (the "HRRA"), 69 *Del. Laws C.* 466, currently codified at 29 *Del. C.* § 4801 *et seq*. Pet.App. 97a-112a. One purpose of the HRRA was to "establish a state-operated lottery . . . which will produce the greatest income for the State." 29 *Del. C.* § 4801(a). Pet.App. 97a. A second purpose was to provide "nonstate supported assistance in the form of increased economic activity and vitality for Delaware's harness and thoroughbred horse racing industries, which activity and vitality will enable the industry to improve its facilities . . . and cause increased employment." 29 *Del. C.* § 4801(b)(1). Pet.App. 97a.

In order to accomplish these purposes, Delaware initiated a joint venture — essentially a partnership — between it and the three horse racing tracks in Delaware (one thoroughbred track and two harness racing tracks) to operate "video lottery" machines, i.e. slot machines, on the premises of the three tracks. As part of this joint venture, each racetrack provides the premises, infrastructure, and organization for the gambling operation, and the State of Delaware provides the

slot machines. The racetracks, as statutorily designated "video lottery agents," are responsible for housing and operating the slot machines and can determine the number of machines they wish to house, up to the statutory maximum of two thousand. 29 *Del. C.* § 4820. Pet.App. 111a. However, the slot machines are owned or leased by the State of Delaware and are directly connected to the central computer system of the State Lottery System. 29 *Del. C.* § 4819(c), § 4820(a). Pet.App. 109a-110a. Moreover, pursuant to the Delaware Constitution, the "video lottery" is under the control of the State of Delaware, and pursuant to statute, the video lottery is operated "by the State Lottery Office. . . ." Del. Const. art. II, § 17(a); 29 *Del. C.* § 4815(b)(2). Pet.App. 93a, 101a-102a.

The State of Delaware and the racetrack owners, including Respondent, share the profits from this joint enterprise, though the State of Delaware exercises complete control over the distribution of profits from the slot machines. Respondent sends monies collected through the slot machines, after payouts to gambling patrons, to an account controlled by the State Lottery Office. 29 *Del. C.* § 4815(b). Pet.App. 100a-107a. The State then pays out funds in accordance with the HRRA. With the partnership proceeds, the State pays the administrative costs associated with the operation of the lottery, including the salaries of State Lottery personnel. Payments are then made to Gamblers Anonymous and similar programs. Thereafter, payments are made for the costs of certain racing officials, including the Administrator of Racing and racing inspectors. Portions of the funds remaining after these amounts are paid out fund horse racing purses and other programs. However, the largest portions of the remaining funds go to the "partners" in the enterprise — the racetrack owners, including Respondent, and the State of Delaware. 29 *Del. C.* § 4815(b)(2) and (3). Pet.App. 101a-103a.

In 1997, video lottery net proceeds in Delaware were $298.91 million, of which the slot machines at Dover Downs contributed $90.13 million. Out of these proceeds, gross contributions of $152.3 million were made to the Delaware General Fund. In 1998, video lottery net proceeds in Delaware were $350.82 million. From these proceeds, $206 million — **approximately 10% of the State's operating budget** — went to the Delaware General Fund. Of the $1.25 billion net proceeds received from slot machines from December 29, 1995 through December 26, 1999, the State of Delaware took $366 million, and the three racetracks, including Respondent, received a total of $620 million (excluding purses).

Not only do the State and Respondent jointly profit from their slot machine operation, but they also jointly conduct harness racing activities at the racetrack. The State of Delaware requires that fourteen harness racing officials assigned to Dover Downs, with titles ranging from "equipment checker" to "state veterinarian," be licensed by the HRC. Respondent pays and supervises these officials, but the HRC Rules set forth their duties and job descriptions in detail. Respondent is required by HRC Rules to enforce State statutes and regulations relating to harness racing.

Both the majority and the dissent below agreed that under Delaware's statutory system, the harness racing operations at Dover Downs are not separate from the video lottery operations, as Respondent contended below, but rather are inextricably intertwined. Pet.App. 10a, 41a. The State of Delaware created the video lottery system in order to provide "assistance in the form of increased economic activity and vitality for Delaware's harness and thoroughbred horse racing industries, which activity and vitality will . . . cause increased employment." 29 *Del. C.* § 4801(b)(1). Pet.App. 97a.

Pursuant to statute, Respondent would not be permitted to house or profit from the slot machines if it did not conduct harness racing meets. 29 *Del. C.* § 4819(a). Pet.App. 108a-109a.

As mentioned *supra*, the State gives a portion of the monies generated by the slot machines to Respondent to be applied to harness racing purses "under the direction of the Delaware Harness Racing Commission." 29 *Del. C.* § 4815(b)(3)b.2. Pet.App. 104a-106a. Thus, the recipients of harness racing purses benefit directly from the profits generated by the slot machines operated jointly by the State and Respondent. Petitioners, though harness racing licensees in good standing, have been completely barred from the opportunity to receive those proceeds for six (6) months each year. They have been excluded without any process whatsoever. Respondent refused even to give them a reason for this exclusion, much less a hearing.

The foregoing facts demonstrate boldly and indisputably that the statutorily created relationship between the State and Respondent has created a close interdependence between the State and a private entity – the type of interdependence first recognized by this Court in *Burton*. As the Court observed in *Burton*,

> [t]he peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. . . . The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be

> considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

365 U.S. at 724, 725.

The important federal question, then, that must be settled by this Court, is whether a joint venture or partnership of this type between the State and a private enterprise, where the State has created an interdependent relationship between it and a private entity for the purpose of conducting a gambling operation, can render the actions of the private entity state action for purposes of the Fourteenth Amendment and Section 1983, even where the State is not directly involved in the challenged activity itself.[1] In this case, because of Delaware's entwinement and interdependence with Respondent in its operations, Respondent's action in excluding Petitioners without due process "'may be fairly treated as that of the State itself.'" *Brentwood*, 531 U.S. at 295 (quoting *Jackson*, 419 U.S. at 351 n.2)).

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1. At its current stage, the record does not indicate that Respondent made the decision to exclude the Plaintiffs with direct input from the State, though the State was informed of the initial decision after the fact and consented to and supported it by its inaction.

II. The Decision Of The Court Below Conflicts With A Prior Decision Of This Court Because The Third Circuit Has Placed An Absolute Condition Upon Any Finding Of State Action, Namely, That The State Must Be Involved In TheChallenged Activity In Order For State Action To Be Present.

In its decision below, the Third Circuit concluded that, in order for state action by a nominally private entity to be found, the State must have been involved not merely in an interdependent, symbiotic relationship with the private entity, but also in the challenged activity itself. The Third Circuit concluded that "*Burton* stands for the proposition that, if a 'symbiotic' relationship does exist, then, by virtue of the close involvement of the state and interdependence of the actors in the association formed **and the challenged activity**, the conduct complained of is in fact 'fairly attributable' to the state." Pet.App. 18a (emphasis added). Such a holding, however, flies in the face of this Court's recent decision in *Brentwood*. There, the Court stated as follows:

> From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

531 U.S. at 295-96. Similarly, the Court in *Brentwood* stated as follows in asserting that no single factor could be used to determined whether state action was present:

> For the same reason, it avails the Association nothing to stress that the State neither coerced nor encouraged the actions complained of. "Coercion" and "encouragement" are like "entwinement" in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead. Facts that address any of these criteria are significant, but no one criterion must necessarily be applied. When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.

Id. at 303.

Therefore, the fact that in the instant case the State of Delaware may not have been directly involved in the challenged activity, i.e., the decision to exclude Petitioners, does not mean that state action cannot be found. The court below should have looked at the relationship between the State of Delaware and Respondent as a whole and should have concluded that there is such a degree of interdependence between the State and Respondent that Respondent's actions may be ascribed to the State for purposes of the Fourteenth Amendment and Section 1983. This comports with the principle first recognized by this Court in *Burton*, that state action may be found even where the State has not directly participated in the challenged activity, but "[b]y its inaction . . . has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. at 725.

Similarly, in this case the State of Delaware apparently did not direct or participate in the unconstitutional activity, but certainly by its inaction supported and reinforced the exclusion of Petitioners.[2]

In holding that the state must be a participant in the challenged activity, the court below fixed upon the following language in *Brentwood*: "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" 531 U.S. at 295 (quoting *Jackson*, 419 U.S. at 351 n.2). Again, the Third Circuit interpreted that language to mean that the state must be involved in the challenged activity itself in order for state action to be present. Pet.App. 18a. However, such a conclusion directly conflicts not only with this Court's pronouncement that "no one criterion [e.g., "coercion" or "encouragement"] must necessarily be applied" in determining whether state action is present, but also with this Court's earlier holding in *Burton* that state action may be found even where the state did not directly act or participate in the challenged activity, but instead implicitly supported the activity by its inaction.[3] *Brentwood*, 531 U.S.

2. The record is undisputed that the Plaintiffs complained to the HRC regarding their exclusion from Dover Downs, and that the HRC effectively threw up its hands, claiming that Respondent had the right as a private entity to exclude anyone it chose.

3. The Court below claims that the *Burton* Court "concluded that there the State was 'recognized as a joint participant *in the challenged activity*,' and not in the private entity as a whole." Pet.App. 18A (quoting *Burton*, 365 U.S. at 725 (emphasis in *Crissman*)). To the contrary, the *Burton* Court held that "[t]he State has so far insinuated itself into a **position of interdependence** with Eagle that it must be recognized as a joint participant in the challenged activity." (Cont'd)

at 303; *Burton*, 365 U.S. at 725. In addition, such a conclusion would eviscerate the "symbiotic relationship" test established by *Burton*. However, both the majority and the dissent in *Brentwood* recognized that the symbiotic relationship test remains viable. 531 U.S. at 301 n.4, 311. While the court below grudgingly acknowledged that *Burton* has never been overruled, it attempted to limit *Burton* to its facts and implied that a mutually beneficial and interdependent relationship such as was found in *Burton*, and as is found in the instant case, can never form the basis for a symbiotic relationship unless the government entity benefits financially and directly from the alleged unconstitutional conduct. Pet.App. 25a.

In stating that state action may be found "if, though only if" there is a close nexus between the State and the challenged activity, this Court was evidently **not** saying that the State must be directly involved in the challenged activity but instead that, under the facts presented – whether those facts show direct involvement by the State or an overall symbiotic or entwining relationship – the imprimatur of the state has been placed on the challenged conduct for purposes of the Fourteenth Amendment and Section 1983. The Third Circuit's opinion has created confusion in this area by imposing a construction upon this Court's words that this Court never intended, and by placing conditions upon the finding of state action in direct contravention of this Court's explicit directives in *Brentwood*.

(Cont'd)
365 U.S. at 725 (emphasis added). Thus, it **was** the State's interdependence with Eagle as a whole, and not any actual participation in the challenged activity, that gave rise to the finding of state action in *Burton*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 30, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5178

CHARLES CRISSMAN;
WENDY CRISSMAN;
*CHRISTINE CRISSMAN,

Appellants

v.

DOVER DOWNS ENTERTAINMENT INC.;
DOVER DOWNS, INC.

* (Dismissed as Party per Court's 11/8/2000 Order)

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 99-cv-00755)
District Judge: Honorable Roderick R. McKelvie

Originally Argued December 5, 2000

Before: McKEE, ROSENN and CUDAHY,**
Circuit Judges

** Honorable Richard D. Cudahy, Senior Judge, United States Court of Appeals for Seventh Circuit, sitting by designation.

Appendix A

Reargued En Banc November 28, 2001

Before: BECKER, *Chief Judge*, SLOVITER, MANSMANN,*** SCIRICA, NYGAARD, ALITO, McKEE, RENDELL, BARRY, FUENTES, and ROSENN, *Circuit Judges*

(Filed: April 30, 2002)

* * *

OPINION OF THE COURT

RENDELL, *Circuit Judge*.

We are called upon in this appeal to determine whether the exclusion of Charles and Wendy Crissman from Dover Downs race track was fairly attributable to the state of Delaware. The Crissmans argue that Dover Downs and the state were in a "symbiotic relationship" such that Dover Downs acted under color of state law based on the Supreme Court's reasoning in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). The District Court held that there was no state action and granted Dover Downs' motion for summary judgment. A panel of this court reversed, but on rehearing en banc, we conclude that the regulation and flow of funds involved here do not equate to the facts in *Burton*

*** The Honorable Carol Los Mansmann participated in the argument and conference of the en banc court in this appeal, but she died before the filing of the opinion.

and do not otherwise support a conclusion that the state is responsible for the Crissmans' exclusion.[1] Accordingly, we will affirm the District Court.

I.

Our jurisdiction is clear under 28 U.S.C. § 1291, and our review of the District Court's grant of summary judgment is plenary, *e.g.*, *Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). We apply the same legal standard as the District Court did, determining whether there is a genuine issue as to any material fact, while viewing the facts and inferences from them in the light most favorable to the Crissmans. *Id.*; Fed. R. Civ. P. 56. If the Crissmans have failed to make a showing sufficient to establish the existence of state action, Dover Downs is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

II.

Although little is straightforward in determining whether a private actor has acted "under color of state law,"[2] one directive

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1. The panel opinion, later vacated by this Court, appears at 239 F.3d 357 (3d Cir. 2001).

2. Where a defendant's conduct is state action under the Fourteenth Amendment, it is also conduct "under color of state law" for § 1983. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982). Because the difference is not significant here, we use the two phrases interchangeably. *See Groman v. Township of Manalapan*, 47 F.3d 628, 638 n.15 (3d Cir. 1995).

emerges clearly from the Supreme Court's jurisprudence: the facts are crucial. In *Burton*'s often-quoted words, "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722. Accordingly, we will begin with a discussion of the facts pertaining to the conduct at issue, namely, the exclusion of the Crissmans from the Dover Downs race track; then we will explore the relationship between the Crissmans and Dover Downs and the nature of the involvement of the state of Delaware.

A. The Crissmans and Dover Downs

Charles and Wendy Crissman live in Delaware and own and train horses. They make their living exclusively from harness racing, and have done so for many years, at least since the late 1970s or early 1980s. In order to participate in racing in Delaware, they are licensed by the Harness Racing Commission of Delaware (the "Commission" or "Harness Racing Commission"), which is part of the state's Department of Agriculture. 3 DEL. C. § 10002. We know little else from the record about the Crissmans.

Dover Downs, Inc., is a private corporation that owns and operates a harness racing facility in Dover, Delaware, where, until 1997, the Crissmans raced their horses. The corporation is a subsidiary of Dover Downs Entertainment, Inc., which apparently has other interests in hotels and NASCAR racing, but which is not named in this suit. Dover Downs is one of two state-licensed harness racing tracks in Delaware, each of which runs races for half the year. Although excluded from Dover Downs, the Crissmans continue to race at the other

track, Harrington Raceway. The Crissmans do not dispute that Dover Downs' facilities were privately built on private land, and are privately owned.

Dover Downs is not only a state-licensed harness racing association, as defined by the harness racing regulations, but is also a state-licensed "video lottery agent." The three lottery agents in Delaware — Dover Downs, Harrington Raceway, and a thoroughbred track — have both racing and video lottery machines (also called video slot machines or "slots"). The video lottery machines were added to the existing harness racing track in 1994 as a separately managed operation. Both activities are subject to extensive regulation by the state.

The general manager of harness racing for Dover Downs, Charles Lockhart, runs the day-to-day operations of Dover Downs' racing facilities and recommended the exclusion of the Crissmans to Dover Downs' president. Lockhart became the general manager on October 20, 1997, only days before he decided to exclude the Crissmans from the harness racing track. A letter was sent to each of the Crissmans — dated October 27, 1997 — informing them that they could no longer race at Dover Downs. The one-sentence letter, which was signed by the president of Dover Downs after discussions with Lockhart, stated: "[A]s of this date you are not welcome on the premises of Dover Downs nor will Dover Downs be accepting any horses owned or trained by you." The race track refused to explain this exclusion.[3] Despite the Crissmans'

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3. A letter sent by Dover Downs' General Counsel to the Crissmans' lawyer in October 1999 stated that "we choose not to debate the merits of our decisions with regard to our right to exclude individuals from our facility."

repeated requests to allow them access, the exclusion continued through the 1997-1998 and 1998-1999 seasons.

Lockhart indicated in his deposition testimony that he excluded the Crissmans because of rumors of licensing denials, doping, and financial irresponsibility, as well as rumors that the Harness Racing Commission was investigating Charles Crissman for false ownership in connection with Delaware-only races. These races, limited to horses wholly owned by Delaware residents or sired by Delaware stallions, were introduced by the race track in the early to mid-1990s, and the rules governing eligibility were formalized in 1998, *see* 3 DEL. C. § 10032. The rules or policies that govern these Delaware-only races could be circumvented through "false ownership" — where the formal owner (presumably a Delaware resident) is not the "true" owner (presumably *not* a Delaware resident). These races make up about five of the thirteen daily races.

Lockhart had heard all of these rumors before beginning his employment with Dover Downs. From 1973 to 1997, Lockhart had worked for an association of harness horse owners, trainers, breeders and drivers. It was in that capacity that he first met Charles Crissman in the late 1970s or early 1980s. Because of Lockhart's position in the association, horsemen came to him with complaints, including complaints that Charles Crissman was circumventing the Delaware-only racing policies and that he had misrepresented horses that he sold.

There is no evidence in the record that the state authorities were involved in any way in the exclusion. It so happened that Lockhart had known Robert Collison, the Harness Racing

Commission investigator who was looking into the claims of false ownership, for fifteen or twenty years and had discussed Charles Crissman's alleged misconduct with him before Lockhart began working at the race track. Lockhart himself acknowledged that he had two conversations with Collison about the investigation while Lockhart was employed by Dover Downs, but both of them took place after the Crissmans had been excluded. There was no evidence of any interaction between Lockhart and Collison — and thus between Dover Downs and the state — in connection with the decision to exclude, or the exclusion of, the Crissmans.

B. Involvement of the State of Delaware

The state of Delaware has consistently taken the position that the decision to exclude the Crissmans was Dover Downs' alone. In February 1999, Delaware's Department of Justice sent the Crissmans a letter (seemingly in response to a request for some action or intervention on its part) stating that the Commission can only request that racing licensees provide the state with a list of excluded people, and that the Commission's licensing power "does not supersede the common law right of a track to exclude individuals for lawful grounds."[4] It directed the Crissmans to take up their complaints with the track.

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4. A Commission regulation specifically provides: "An association may eject or exclude a person for any lawful reason. An association shall immediately notify the State Steward and the Commission in writing of any person ejected or excluded by the association." Delaware Harness Racing Commission Rules and Regulations ("Commission Rules"), ch. IV, IV.E.

In fact, the Crissmans acknowledged at oral argument that the state had no "direct" involvement in Dover Downs' conduct, arguing instead that state regulation and the flow of funds between Dover Downs and the state by virtue of the video lottery operation made their exclusion "fairly attributable to the state." Both the harness racing and the slot machines are heavily regulated, as is true in most states where gambling or racing are permitted.

The statute establishing the Harness Racing Commission gives it power to promulgate regulations regarding harness racing operations. These are detailed in their provisions, reaching such aspects of racing as the videotaping systems to be used, the appropriate surface for the race track, and even the colors to be worn by the various starting-gate positions. Delaware Harness Racing Commission Rules and Regulations ("Commission Rules"), ch. IV, III. C, D, H.

The regulations subject certain race track personnel to regulatory approval. Horse owners and trainers, race track owners, and various officials must be licensed by the state, and some of the employees' positions are defined by the Commission Rules. *See, e.g.*, 3 DEL. C. § 10023. Nonetheless, Dover Downs pays, supervises, and is in charge of hiring decisions and, generally, decisions to fire employees. There are a few exceptions. Some judges may be paid by the state, which is then reimbursed by the track, and the state veterinarian is state-appointed, Commission Rules, ch. III, XII.A.1. But neither has a role in managing the track's operations; the judges oversee the fairness of the races and the state veterinarian evaluates the horses' health. Commission Rules, ch. III, XII.A.3. Moreover, there can be no involve-

ment going the other way; no one with an official relationship to a harness racing association can be an employee of the Commission. 3 DEL. C. § 10007.

The Commission has reserved for itself numerous rights and powers, including the right to regulate admission charges, approve changes to a track's buildings, compel production of books or other documents showing a track's receipts and disbursements, require removal of any of the track's employees or officials, place expert accountants in the track's offices to ensure compliance, and issue subpoenas for the attendance of witnesses and production of documents before the Commission. 3 DEL. C. § 10029. While comprehensive from a regulatory standpoint, these regulations stop short of giving the state any interest or role in the day to day operations of Dover Downs or its decision-making as to how it runs its business.[5]

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5. The regulatory scheme governing racing is similar to Pennsylvania's, which we had the opportunity to consider in *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir. 1979), where we held that "the State's relationship to the heavily regulated racing industry [was] not sufficient to establish a symbiotic relationship under *Burton*." *Id.* at 596. The scheme there included detailed regulations, licensing of officials and description of their job duties, state approval of officers and even stockholders of private racing associations, a substantial state financial interest in tax revenue, as well as a rule calling for the track to "enforce" Racing Commission Rules. Ultimately we found state action because racing officials, who were privately paid but had authority from the Commission to oversee the races, had participated in the decision to expel a trainer from the track. But the regulatory scheme in itself did not make the action "fairly attributable to the state." *Id.*

The state regulations also reflect the state's concern for the finances of harness racing associations like Dover Downs, in that the associations are subject to audits by the Commission and must periodically submit financial statements. 3 DEL. C. §§ 10029(e); 10030; Commission Rules, ch. IV, II.B. The Commission can enforce these measures through several of the special powers it has reserved — particularly the power to place an accountant in a licensee's office, *see* 3 DEL. C. § 10029(e) — and, presumably, through its power to suspend or revoke licenses, 3 DEL. C. § 10026. Nonetheless, Dover Downs makes its own independent fiscal decisions.

The horse racing regulations are only one aspect of the state's relationship with Dover Downs, of course, and we agree with the panel opinion that Dover Downs' video lottery and racing activities should be considered together. Whereas the state has been involved in the regulation of horse racing for some time,[6] state licensing of video lottery at horse tracks is a fairly recent development.[7] It was first permitted in Delaware

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6. Several of the provisions of the statute regulating harness racing in Delaware date back to 1945. *See* 45 DEL. Laws 303 (1945).

7. Similar legislation exists in a few other states. *See, e.g.*, W. Va. Code § 29-22A-2 (2001) (authorizing video lottery machines at horse or dog tracks); S.D. Codified Laws § 42-7A (2001) (establishing a video lottery business under the direction of an independent state agency). Amici curiae, the Thoroughbred Racing Associations of North America and Delaware Racing Association, suggest that such an arrangement is under consideration in several more states.

upon the passage in 1993 of anact known as the "Horse Racing Redevelopment Act" (the "Act"), which had as its stated purpose the revitalization of the horse racing industry in Delaware. 69 DEL. Laws 446. The video lottery machines were introduced in 1994 and were limited to existing tracks. *See* 29 DEL. C. § 4819(a).[8] Dover Downs and Harrington Raceway are permitted to house video lottery machines and to become "agents" only because they were racing tracks in existence when the Act was passed. Further, when Dover Downs chose to become a video lottery agent, its racing activities became subject to certain additional restrictions — video lottery agents are required, for instance, to conduct more days of harness racing than they did before the passage of the Act, and to increase the number of employees. *See* 3 DEL. C. § 10148(1).

Like harness racing, the video lottery is subject to detailed regulations. These include licensing requirements and certain restrictions on the lottery agents, such as caps on the number of machines that can be at any one location. 29 DEL. C. § 4820. The machines, which the state purchases, or in some instances leases, from the manufacturers, are connected to a central state computer, but are housed and operated on private property. *See* 29 DEL. C. §§ 4819(c), 4820 (licensees submit a proposed plan for obtaining video lottery machines but the state lottery director actually leases or purchases them from the manufacturers).

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8. The statutory provisions governing the video lottery were added to an existing statute, which permitted a state lottery and described its mechanisms, including the duties of the director of the state lottery to "operate and administer" the lottery, as well as to promulgate rules and regulations. 29 DEL. C. § 4805(a).

Statutory provisions also govern the handling of proceeds.[9] A portion of the video lottery proceeds flows directly to the track's racing operation as purse enhancements. 29 DEL. C. § 4815(b)(3)b; 3 DEL. C. § 10048(2). Even racing tracks that are not video lottery agents receive funds from the video lottery, provided that they maintain a certain purse size and number of racing days. 29 DEL. C. § 4821. In addition to this subsidy, Dover Downs acts essentially like a government contractor — the state pays Dover Downs a commission for housing and operating the slots. 29 DEL. C. § 4815.

The funds also flow in the other direction, as the state receives a portion of the video lottery proceeds. Indeed, raising money for the state is what makes the lottery permissible under the Delaware Constitution, which generally prohibits gambling, but makes an exception for lotteries "under State control" designed to raise money for the state. DEL. CONST. § 17. The revenues from the slot machines — minus the money won by players — go to a state fund, from which money is paid out as dictated by statute. *See* 29 DEL. C. § 4815. In addition to the payments to the racing tracks described above, funds flow to the state to reimburse it for administrative costs, to organizations that help compulsive gamblers, and to the state's general fund. *See id.* The revenues

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9. *See* 29 DEL. C. § 4815. Parts of this section were revised in 1997, but the changes do not affect our analysis. The revised statute allocates funds to jockey organizations and the Delaware Standardbred Breeder's Program, and instead of the video lottery agents' reimbursing the state for equipment costs, these costs are paid out of funds allocated to the state. *See* 29 DEL. C. § 4815(b)(3) (2001).

coming to the state of Delaware from the video lottery operation have been quite significant — in 1997, video lottery contributions to the state general fund were $152.3 million and Dover Downs earned $90.13 million, while the next year they earned $206 and $113.12 million, respectively.

Factually, then, the Crissmans complain of an act by an employee of a privately owned race track in which the state was, undisputedly, not directly involved. However, Dover Downs acknowledges that its harness racing and video lottery activities are subject to extensive state regulation, and both the track and the state receive funds from the operation of the video lottery machines. It is the characterization of the relationship formed by these elements that is at the heart of the disagreement between the parties.

III.

After having been excluded from Dover Downs for two seasons, and on the day before the 1999-2000 season began, the Crissmans filed a complaint in federal district court in Delaware. They made a claim under § 1983 that Dover Downs' exclusion of them without a hearing violated their Fourteenth Amendment Due Process rights. A necessary element of this claim was that Dover Downs had violated these rights while acting "under color of state law." 42 U.S.C. § 1983.

The District Court invited and then considered further evidence specifically on the state action issue before granting Dover Downs' motion for summary judgment on the ground

that the Crissmans had not sufficiently shown this element.[10] *Crissman v. Dover Downs, Inc.*, 83 F. Supp.2d 450, 453, 455 (D. Del. 2000). The Court concluded that state regulation and receipt of revenue did not make this privately owned harness racing facility a state actor under the test urged by the Crissmans, namely the "symbiotic relationship" test first announced by the Supreme Court in *Burton*. *Id.* at 454. Further, it found no evidence that state officials participated in the decision to exclude the Crissmans. *Id.* at 455. That is, it found no evidence of a "close nexus" between the state and the conduct, which could establish state action under *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

The Crissmans filed a timely appeal of this decision. A panel of this Court reversed the District Court's grant of summary judgment for Dover Downs based on its view that the track did have a "symbiotic relationship" with the state of Delaware. *Crissman v. Dover Downs Entm't Inc.*, 239 F.3d 357, 358 (3d Cir. 2001). The panel reasoned that *Burton* established an exception to the general rule that the state must be involved in the challenged conduct, and that *Burton* permitted state action to be based on the facts here, namely, facts demonstrating what it termed "overall involvement of the State in the affairs of the private entity." *Id.* at 361. This was

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10. Dover Downs filed a cross-motion for summary judgment in response to the Crissmans' motion for a preliminary injunction. The District Court's decision on the summary judgment motion resolved both. The parties agreed that the record for the motions would consist of a stipulation of undisputed facts and the items presented as the record at the preliminary injunction hearing.

the first opinion in which we applied *Burton* to find state action since 1984, and one of only a few to reach that conclusion without a finding that the entity involved was an "instrumentality" of the state.[11] Interestingly, the Supreme Court's most recent pronouncement in the area of state action does not reference *Burton*, and the scope of *Burton*, and its applicability here, presents an important issue. We vacated the panel opinion so that this issue could be considered by the entire Court.

IV.

The basic question we must ask, and answer, in the state action arena is whether the exclusion of the Crissmans from Dover Downs can be fairly attributed to the state. *See, e.g.*, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). The Supreme Court has established a number of approaches to this general question, which it has recently said are essentially "facts that can bear on the fairness of such an attribution." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001).

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11. Most of our cases finding state action under *Burton* date from the 1970s and involved universities and libraries. *See Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) (University of Pittsburgh and Temple University); *Benner v. Oswald*, 592 F.2d 174 (3d Cir. 1979) (Pennsylvania State University); *Chalfant v. Wilmington Inst.*, 574 F.2d 739 (3d Cir. 1978) (en banc) (library); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (en banc) (University of Pittsburgh); *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976) (library).

Regardless of whether these are "tests" or "facts,"[12] *Brentwood* directs courts to focus on the fact-intensive nature of the state action inquiry, mindful of its central purpose: to "assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.' " *Id.* at 295 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original)).

The Crissmans rely primarily on the "symbiotic relationship test" the Supreme Court announced in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Alternatively, but clearly less vigorously, they assert that state action here could also be based on the "close nexus" between the challenged action and the state, which we will discuss below. First we will address *Burton*, its relationship to the general state action inquiry, its scope, and how its facts compare to those before us here.

A. *Burton*

In *Burton*, a restaurant located in the Wilmington Parking Authority, a state-owned parking facility, refused to serve a customer because of his race. The Court concluded that this discriminatory conduct was state action. The state's parking facility was highly dependent on the revenue from the leases

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12. The Supreme Court pointed out in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), that it has never been clear "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in [each] situation." *Id.* at 939; *see also Groman v. Township of Manalapan*, 47 F.3d 628, 639 n.16 (3d Cir. 1995). *Brentwood* seems to embrace the second understanding.

— nearly 70% of the funds necessary to pay the financing for the facility came from leases, while only 30% came from parking revenue. Patrons of the state's activity (parking) benefitted from the lessee's activity (restaurant services). And the activity complained of — the discriminatory service of restaurant patrons — was the source of revenue needed for the state's operation of the project: "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Burton*, 365 U.S. at 724.[13]

Moreover, the restaurant was on publicly owned land and was located within the exterior walls of a public parking garage. Signs on the garage indicated that the building as a whole was public, and the Supreme Court concluded that the state had "elected to place its power, property and prestige behind the admitted discrimination." *Id.* at 719, 725. The physical location of the restaurant involved the state further in its operations: any improvements the restaurant made to the building would be tax exempt and the state was responsible for physical maintenance and provision of utilities. The Court held that the "symbiosis" — close association of mutual benefit — dictated a finding of state action.

We must consider at the outset the panel's view that *Burton* contains an exception to the principle that the state must have been implicated in the conduct complained of. Justice Souter's recent blanket statement in *Brentwood* seems

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13. The conclusion that the state benefitted was based in part on the restaurant's assertion that serving African-Americans would hurt its business. *See Burton*, 365 U.S. at 724.

to leave no room for such an exception. There, he stated categorically that in order to determine whether an action is fairly attributed to the state, we must look at the challenged conduct: "state action may be found *if, though only if*, there is such a 'close nexus *between the State and the challenged action*' that seemingly private behavior 'may be fairly treated as that of the State itself.' " *Brentwood*, 531 U.S. at 295 (emphasis added).

In *Burton*, the Supreme Court characterized *the conduct* as bearing a very significant relationship to the state: "[T]he profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Burton*, 365 U.S. at 724; *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (emphasizing the role this fact played in the outcome of *Burton*). By referring in general terms to *Burton*'s "joint participation test," courts often forget that *Burton* concluded that there the state was "recognized as a joint participant *in the challenged activity*," and not in the private entity as a whole. *Burton*, 365 U.S. at 725; *see also id.* at 724 (concluding that all of the activities "indicate[ ] that degree of *state participation and involvement in discriminatory action* which it was the design of the Fourteenth Amendment to condemn" (emphasis added)).

Accordingly, we conclude that *Burton* stands for the proposition that, if a "symbiotic" relationship does exist, then, by virtue of the close involvement of the state and inter-dependence of the actors in the association formed and the challenged activity, the conduct complained of is in fact "fairly attributable" to the state. Instead of examining the

conduct and, then, the state's role in it, *Burton* would have us look first at the relationship and test whether the conduct could be linked to the joint beneficial activities — as it was in *Burton* due to the essential revenues flowing from the discriminatory restaurant operation. We view *Burton*, then, not as an exception to the rule that the conduct complained of must be fairly attributable to the state, but, rather, as providing another vantage point or way of assessing the necessary connection to the state.

B. *Burton*'s Scope

How, and whether, we then apply *Burton* depends on the extent to which its principles still control our analysis. The Supreme Court has had occasion in the more than 40 years since *Burton* was decided to consider state action in no less than a dozen cases, and while referring to and characterizing the *Burton* "test" in several opinions, the Supreme Court has never relied upon it again to find state action. Nor, however, has it overruled it.[14]

The Court itself, and several of the Justices, have noted the narrow reach of *Burton*. In *American Manufacturers Mutual Insurance v. Sullivan*, 526 U.S. 40, 57 (1999), seven Justices opined that "*Burton* was one of our early cases dealing with 'state action' under the Fourteenth Amendment,

14. As the Supreme Court has directed, "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). There, it stated that the court of appeals was correct to apply the relevant Supreme Court decision despite what the court of appeals described as the case's "infirmities, [and] its increasingly wobbly, moth-eaten foundations." *Id.*

and later cases have refined the vague 'joint participation' test embodied in that case."[15] Further, in *American Manufacturers*, the Supreme Court reversed our court's determination that private insurers became state actors by providing benefits under the extensively regulated and state-controlled workers' compensation system, admonishing our court for having "figuratively thrown up its hands and fallen back on language in our decision in *Burton*." *Id.*

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15. *See also NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (explaining that there is state action under *Burton* where the state "knowingly accepts the benefits derived from unconstitutional behavior").

Justice O'Connor has written two dissenting opinions indicating *Burton*'s narrow scope. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), she wrote:

> Our decision in *Burton* . . . was quite narrow. We recognized "the limits of our inquiry" and emphasized that our decision depended on the "peculiar facts [and] circumstances present." . . . We have since noted that *Burton* limited its "actual holding to lessees of public property," *Jackson v. Metropolitan Edison Co.*, [419 U.S. at 358,] and our recent decisions in this area have led commentators to doubt its continuing vitality . . . .

Id. at 409 (O'Connor, J., dissenting). Similarly, in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), she questioned "the continuing vitality of *Burton* beyond its facts" and noted that "the decision in [*Burton*] depended on the perceived symbiotic relationship between a restaurant and the state parking authority from whom it leased space in a public building" and that "the State stood to profit from the restaurant's discrimination." *Id.* at 636 (O'Connor, J., dissenting).

And, curiously, in its most recent pronouncement in *Brentwood*, the Supreme Court reviewed the extensive litany of "facts" that bear on whether there is state action, but did not reference *Burton*. Justice Souter wrote:

> [A] challenged activity may be state action when it results from the State's exercise of "coercive power," *Blum* [*v. Yaretsky*, 457 U.S. 991, 1004 (1982)], when the State provides "significant encouragement, either overt or covert," *ibid.*, or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar* [*v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982)] (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792 (1957) (per curiam), when it has been delegated a public function by the State, *cf.*, *e.g.*, *West v. Atkins*, [487 U.S. 42, 56 (1988)]; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), when it is "entwined with governmental policies," or when government is "entwined in [its] management or control," *Evans v. Newton*, 382 U.S. 296, 299, 301, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).

Brentwood, 531 U.S. at 296. Notably absent is any reference to the "symbiotic relationship test," or to *Burton*. In fact, *Burton* is never mentioned in the majority opinion.[16]

The fact remains, however, that *Burton* has not been overruled, nor its reasoning discredited by the Supreme Court in the text of any opinion, despite numerous opportunities. Because the full range of Supreme Court precedent that now guides our analysis appears to narrow, but not to overrule, *Burton*, we must conclude that, while *Burton* remains good law, it was crafted for the unique set of facts presented, and we will not expand its reach beyond facts that replicate what was before the Court in *Burton*.

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16. "The Crissmans point to the use of the word "symbiosis" in footnote four in *Brentwood* as evidence that the Court still embraces the *Burton* "test," despite the fact that the majority does not cite to *Burton* or expound on the theory. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 301 n.4 (2001). But the footnote pertains to an unrelated point, the rejection of formalism in determining state action, and "symbiosis" arises only as an example of a criterion that looks to underlying reality. In the footnote, the majority's only reference to "symbiosis" is as a criterion of state action "which the dissenters accept," which could be said to imply that the majority *does not* accept it. The dissenting Justices did, in fact, cite *Burton* and include the "symbiotic relationship test" among the approaches they discussed and applied. They found no state action under *Burton* because the private entity acted as a contractor and the state did not profit from the challenged activity." *Id.* at 935, 939 (Thomas, J., dissenting).

C. Application of *Burton*

Given the thrust of recent Supreme Court precedent, and given the fact pattern presented by the operation before us, the conduct complained of, and the regulatory scheme, we cannot conclude that the state and Dover Downs had a "symbiotic relationship" as existed in *Burton* such that the exclusion of the Crissmans could be found to be fairly attributable to the state of Delaware. Unlike the state in *Burton*, Delaware was not conducting any operation together with the race track at Dover Downs. It was not operating a mutually beneficial business there. Rather, it licensed Dover Downs to operate as a harness racing track and as a video lottery agent, it regulated both operations, it authorized the use of video lottery proceeds to subsidize harness racing, it paid Dover Downs a commission for housing and operating the video lottery machines, and it received funds from the video lottery operation.

Although some public property was involved, since the slot machines were owned or leased by the state, the conduct did not take place on state property as in *Burton*, so that there is no basis for finding that the state was in any way putting its support behind the conduct of the private entity. *See, e.g.*, *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 67 (3d Cir. 1990) ("The fact that the [newspaper] concessionaires lease their premises from a governmental entity also falls short of triggering state action . . . . In such circumstances, state action will be recognized only when there is a 'symbiotic' relationship between the private and governmental entities, such that the public might reasonably conclude from that relationship that the government has lent its support to the private entity's actions.").

In fact, the type of state-private relationship present here seems more analogous to the fact patterns involved in cases that have addressed whether government regulation and funding convert private action to state action. The Supreme Court made clear early in its state action jurisprudence that state licensing was not enough to make a private entity a state actor, *see Moose Lodge v. Irvis*, 407 U.S. 163, 176 (1972), and the Court has repeatedly opined that regulation — even detailed regulation, as we have here — does not equate to state action, *see, e.g., Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) (a heavily regulated utility company was not a state actor).

The Supreme Court has stated with equal force that the flow of funds does not implicate the state in private activity. The state of Delaware subsidizes harness racing by using some of the revenue from the video lottery, but it is clear that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987). Here, the state also pays Dover Downs a substantial commission for housing and operating the video lottery, but, as the Supreme Court directed in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), neither the fact nor the size of this commission makes Dover Downs anything more than a private contractor that performs a service. In *Rendell-Baker*, a privately operated school that treated students with special needs received at least 90% of its operating budget from the state. *Id.* at 843. Nonetheless, the Supreme Court characterized the school's "fiscal relationship with the State" as "not different from that of many contractors performing services for the government." *Id.*; *see also Blum*

v. Yaretsky, 457 U.S. 991, 1011 (1982) ("That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business."). And, the use of the term "agent" does not change this reasoning. *Brentwood* directs us to look to reality rather than form, and Dover Downs does not function as a traditional agent, who could, for instance, bind the state.

Under the regulatory scheme here, the state does benefit from the proceeds of the video lottery. The Supreme Court has had little opportunity to address the impact on the state action inquiry of the flow of funds in this direction, as most cases have involved the flow of money *from* the state *to* private entities. This is not surprising, for it would be a radical concept if the state's receipt of funds from private actors were to convert them into state actors. If this were the case, the state's receipt of tax revenue from a private entity's operations would qualify most corporations as federal actors, which is surely not a desirable result. *See Brown v. Philip Morris Inc.*, 250 F.3d 789, 803 (3d Cir. 2001).

While the Court's ruling in *Burton* did turn to some extent on the state's receipt of and need for the restaurant revenue, we submit that its fact pattern was unique and must be so limited. There, the state would not have been able to finance or pay for the parking facility absent the restaurant's lease, the demand for its parking was potentially increased by the restaurant's presence, and, as noted above, it financially benefitted directly from the specific discriminatory conduct.

Appendix A

As government's contractual involvement and interaction with private industry in so many ways is not only the norm today, but indeed arguably on the rise, if a financially advantageous contractual relationship providing revenue to the state were enough to make a private entity a state actor, it would tip the careful balance between preserving "an area of individual freedom" and "assuring that constitutional standards are invoked" when the state is responsible for the conduct at issue. *Brentwood*, 531 U.S. at 295.

In sum, the presence of both these elements — regulation and flow of funds — that are separately unpersuasive in the state action inquiry does not amount to more than each alone; the combination brings no greater result — namely, no state action.[17] Delaware is not associated in the harness racing or

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17. This is consistent with the conclusion of most courts of appeals, including our court, that the conduct of employees of state-regulated race tracks is not state action absent a showing of a direct connection between the state and the specific conduct at issue. In *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589 (3d Cir. 1979), we held that Pennsylvania's regulatory scheme did not make the action of a race track "fairly attributable to the state," although we ultimately found that this was state action based on the direct involvement of racing officials in the conduct. We compared the case to *Jackson* and *Moose Lodge*, and concluded that the state was not a "joint venturer" with the track such that every act of the track could be said to be an act of the state. *Id.* at 596. *See also Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1082 (2d Cir. 1990) (exclusion of a harness racehorse driver was not state action under *Burton* where the state had no proprietary interest in the track and did not have a "neighboring, interlinked business, and consequently lack[ed] as direct a financial stake in [the track's] success as was present in *Burton*"); *Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221, 226 (Cont'd)

video lottery operation, nor are the monies that flow to the state tied in any way to the conduct the Crissmans complain of. The deeper involvement and "interdependence" present in a unique way in the fact pattern considered in *Burton* simply are not present here.[18]

(Cont'd)
(5th Cir. 1984) (denial of stall space was state action because of regulation *combined with* direct participation of a racing official in the decision); *Bier v. Fleming*, 717 F.2d 308, 311 (6th Cir. 1983) (exclusion of a harness race driver was not state action where there was extensive regulation and revenue to the state but no evidence that the state participated in the conduct); *Fulton v. Hecht*, 545 F.2d 540, 542-43 (5th Cir. 1977) (failure to renew contract to race greyhounds was not state action despite the state's role in auditing the track's books and issuing licenses and permits, the extensive revenue to the state, the presence of a state veterinarian at the track, and the fact that the track was the only one available during one-third of the year).

18. Our dissenting colleagues argue "tests" — joint venture and partnership — never specifically espoused by the Supreme Court as "tests" for state action. They do so based upon language in *Moose Lodge v. Irvis* to the effect that certain facts did not make the state a partner in any real sense. However, we do not take this reference as establishing that every partnership or venture with the state will result in a finding of state action. Rather, any relationship formed would have to be tested against the attributes found to be hallmarks of state action in cases such as *Burton*. Thus, even if called by another name, the relationship must permit one to conclude that the action is fairly attributable to the state. Even if the Supreme Court were to espouse affirmatively a state action theory of joint venture or partnership (which does not seem to "fit" given the concept of joint and several liability and the sufficiency of other tests to accomplish the same result), we do not view the facts here as implicating the state in the exclusion of the Crissmans.

D. Third Circuit State Action Jurisprudence

We find nothing in our own jurisprudence regarding state action or *Burton* that would require a different analysis or result. At the same time that the Supreme Court has been developing the law in this area, we have written many opinions of our own focusing on state action, and have referenced *Burton* perhaps more than other courts (and definitely more than the Supreme Court). But, like the Supreme Court in its jurisprudence, we originally noted the presence of *Burton* as a test, but have gradually come to appreciate its limitations.

We have revisited *Burton* periodically as the Supreme Court's state action jurisprudence has evolved. When faced with the question whether *Burton* survived the announcement of the "close nexus test" in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), we concluded that it remained a viable framework. *See Braden v. University of Pittsburgh*, 552 F.2d 948, 957-58 (3d Cir. 1977) (en banc). We reached the same conclusion in *Krynicky v. University of Pittsburgh*, 742 F.2d 94, 98-99 (3d Cir. 1984), after the Supreme Court decided the so-called *Lugar* trilogy, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982). But *Krynicky* and *Braden* have limited relevance to the situation here, not only because both predate the Supreme Court's most recent pronouncements, but also because they involved universities that we held to be "instrumentalities" of the state — factually and statutorily. We also held that the state was "deeply enmeshed in operations of the University" including "its financing and its basic decision-making processes," *Braden*, 552 F.2d at 959, and that the state

had taken the affirmative step of "statutorily accepting responsibility for these institutions," *Krynicky*, 742 F.2d at 102, neither of which is the case here.

We have consistently noted the fact-specific nature of the "involvement and interdependence" present in *Burton*. *Boyle v. Governor's Veterans Outreach & Assistance Ctr.*, 925 F.2d 71, 76 (3d Cir. 1991). In *Boyle*, we characterized *Burton* as depending on the fact that "the state had many obligations and responsibilities regarding the operation of the restaurant; mutual benefits were conferred; and the restaurant operated physically and financially 'as an integral part of a public building devoted to a public parking service.' " *Id.* Two years later, in *Black v. Indiana Area School District*, 985 F.2d 707 (3d Cir. 1993), we took a slightly narrower view, noting that *Burton* "turned on" the facts listed in *Boyle* and, further, that the profits from the discriminatory conduct were "indispensable" to the finances of a government agency. *Id.* at 711.

And, in our most recent pronouncement in the area of state action, we voiced our doubts as to *Burton*'s continued force. In *Brown v. Philip Morris Inc.*, 250 F.3d 789 (3d Cir. 2001), we were called upon to decide whether tobacco companies were government actors. Calling *Burton* "seminal, albeit somewhat idiosyncratic," we noted that the government's and the cigarette manufacturers' relationship — forged by beneficial revenue and by labeling regulations — did not constitute the "interdependence" necessary under *Burton*. *Id.* at 803. We stated:

> Virtually all enterprises are subject to tax collection and, to varying degrees, to regimes of administrative regulation; were these attributes enough to satisfy the test of *Burton*, substantially all businesses in the country would effectively become federal actors . . . . Moreover, although *Burton* retains much of its precedential value, it should be noted that the Supreme Court has recently cast some degree of doubt upon that decision.

Id. Thus, our own jurisprudence is quite consistent with the limited applicability of *Burton* to its facts — facts not present here.

E. Other Bases for State Action

In the absence of facts equating to those present in *Burton*, the Crissmans still could show that their exclusion was fairly attributable to the state if the situation were to "fit" within one of the other approaches or "tests." They argue that the "close nexus" test applies. We disagree.

The Crissmans conceded at oral argument that the state had no "direct" involvement in the action, but they nonetheless urged the "close nexus" argument in their briefs and maintained at oral argument that it applies here. They argued that "the state has delegated sufficient authority to Dover Downs to make Dover Downs an agent of the state" and that "Dover Downs' exclusive authority over racing activity for six months each year" establishes the required nexus.

The Crissmans theorize that their exclusion was, in effect, a decision that they were ineligible for Delaware-only races for the six months of the year during which Dover Downs was the only harness racing track in operation. So, they urge, the Commission effectively delegated to the race track its power to determine eligibility, *see* 3 DEL. C. § 10032(e), making Dover Downs a state actor. But this argument is without merit. The Crissmans challenge their exclusion from the track itself and from *all* of the races, not only from those with limited eligibility. Further, they do not allege that any decision *about their eligibility* — whether they were or were not Delaware residents, for instance — violated their Due Process rights. *Cf. Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1084 (2d Cir. 1990) (rejecting the argument that a track was a "monopoly" so that its exclusion of a horse owner was a de facto license revocation by the state). Moreover, the section of the statute the Crissmans rely on — 3 DEL. C. § 10032 — became effective in July 1998, after the initial decision to exclude them.

The Crissmans advance a second argument based on the fact that Dover Downs is the only race track in operation for six months of the year. They contend that since the Commission has the power to designate the days a harness racing track can operate, *see* 3 DEL. C. § 10023(c), it had granted the track a "six-month monopoly." This argument relies on the Supreme Court's suggestion in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), that conduct of "a heavily regulated [business] with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics." *Id.* at 453. But *Jackson* itself then

proceeded to ask whether the conduct was fairly attributable to the state. *Id.* Even if Dover Downs had a "six-month monopoly," this would not alter our conclusion that, for the reasons given above, the state can not be said to be responsible for the Crissmans' exclusion. Indeed, *Jackson* reached the same result — no state action. *See also Fulton v. Hecht*, 545 F.2d 540, 543 (5th Cir. 1977) (rejecting the argument that state action was present because the dog track was "granted a monopoly one-third of the year").

In their opposition to Dover Downs' petition for rehearing, the Crissmans also pointed to the Commission Rule that provides that an association "shall abide by and *enforce* the Act and the rules and orders of the Commission" as involving Dover Downs in the state enforcement activity. Commission Rules, ch. 5, I.1 (emphasis added). The panel opinion termed Dover Downs "an executive arm" of the Commission, and, thus, of the state of Delaware, on the ground that this rule delegated to Dover Downs a power traditionally associated with sovereignty. *Crissman v. Dover Downs Entm't Inc.*, 239 F.3d 357, 362 (3d Cir. 2001) (quoting *Jackson*, 419 U.S. 345, 352-53 (1974) ("If we were dealing with the exercise by [the utility] of some power delegated to it by the State which is traditionally associated with sovereignty .... our case would be quite a different one.")). But we are unpersuaded by a single provision in the context of all of the other facts we have noted indicating that the exclusion was not fairly attributable to the state. Moreover, a sensible reading of the verb "enforce" in this context would be "to oversee compliance," rather than "to enforce" in the sense of actual policing or active governmental or official "enforcement"

of rules and regulations.[19] This reading is consistent with our conclusion in *Fitzgerald v. Mountain Laurel Racing*, 607 F.2d 589 (3d Cir. 1979), that the Pennsylvania racing scheme, which contained a similar "enforcement" provision, did not make a track's conduct state action.

In sum, there is no evidence of a close nexus between the exclusion of the Crissmans and the state of Delaware. Further, the Crissmans have not argued, or demonstrated, that their exclusion was state action under any other of the "tests" or "facts" established by the Supreme Court.[20]

V.

For the reasons above, we conclude that the District Court appropriately granted summary judgment in favor of Dover Downs, and we will accordingly AFFIRM.

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19. In fact, the rule has since been amended so that "abide by and enforce" is replaced with "comply with." 5 Del. Register of Regs. § 3.2.4 (Oct. 1, 2001).

20. Because we will affirm the grant of summary judgment on the basis of the state action issue, we need not reach the question of whether a constitutional right was denied. Also, given our ruling, we do not need to address the Crissmans' request that we reverse the District Court's denial of their motion for a preliminary injunction.

Appendix A

ROSENN, *Circuit Judge*, Dissenting:

In 1993, Delaware departed from its role as solely a regulatory body of the three horse racing tracks in the state and decided to mount joint enterprises with each of them. Therefore, the expulsion without a hearing of the Crissmans, "licensees in good standing with the Harness Racing Commission for the State of Delaware,"[1] after about twenty-five years as horse trainers and horse owners at the Dover Downs race track fairly may be attributed to the State under 42 U.S.C. § 1983.[2] I, therefore, respectfully dissent.

I.

The courts have never succeeded in formulating and applying a precise test for the recognition of state action under the Equal Protection Clause. In "sifting [the] facts and weighing [the] circumstances," *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961), the entrepreneurial involvement of the State in the formerly private operations of Dover Downs is evident. Fortunately, the facts are transparent and undisputed.

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1. Paragraph 2, Stipulation of Undisputed Facts.

2. 42 U.S.C. § 1983 provides: "Every person who, under color of any . . . regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress."

The majority concludes that the regulations and flow of funds do not equate to the facts in *Burton* and do not otherwise support the exclusion of the Crissmans from the Dover Downs race track as "fairly attributable to the state of Delaware." (Maj. op. at 3). The majority is correct that the facts do not equate to *Burton.* The facts here are not only distinct from *Burton* but far more impressively support state action.

Dover Downs attempts to portray a relationship with the State at the time the Crissmans were expelled as simply regulatory. I agree that a regulatory relationship alone clearly is insufficient to constitute state action. The Supreme Court so held in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), and we have so held in *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 596 (1979). Nonetheless, we noted in *Fitzgerald* that:

> Where a private enterprise stands, in its operations, as a veritable partner with the state, then it seems proper to hold such enterprise subject to the same constitutional requirements to which the state is accountable.

Id. at 595 (quoting *Braden v. Univ. of Pittsburgh (Braden II)*, 552 F.2d 948, 958 (1977)).

Similarly, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Supreme Court in essence held that extensive and detailed regulation of a private club generally is insufficient to convert it into a state actor. *Id.* at 176-77. The Supreme Court, however, also observed that although the Moose Lodge was heavily regulated, it could not be said to be "a partner or even a

joint venturer in the club's enterprise," *id.* at 177, thus implying that a partnership, or even a joint venture relationship between the State and a private enterprise, as we have here, might bring different consequences.

In this case, the record demonstrates that when Delaware enacted the Horse Racing Redevelopment Act (HRRA) in 1993 to rejuvenate a declining state horse-racing industry and, at the same time, enhance its own revenues, it augmented its regulatory relationship. The State and Dover Downs became joint entrepreneurs in a lottery and race track enterprise. The slot machines used by Dover Downs were the property of, or leased by, the State, not Dover Downs. The State exercised control over the slot machines by directly connecting them to the central computer system at the State Lottery Office. To this enterprise, the race track contributed its race track premises, its infrastructure, its organization, and its operating capital. In this joint enterprise fashioned and molded by the State, the State acts in a business capacity, not as a regulatory force. Dover Downs is a licensed state lottery agent.

The record also reflects that the state joint video lottery is inextricably linked with harness-racing. The State of Delaware's avowed purpose in creating the video lottery was to provide "assistance in the form of increased economic activity and vitality for Delaware's harness and thoroughbred horse racing industries, which activity and vitality will . . . cause increased employment." 29 Del. Code Ann. tit. 29, § 4801(b)(1). Under Delaware law, Dover Downs would not be permitted to operate a video lottery if it did not conduct harness racing meets. *Id.* § 4819(a).

Another purpose of the state-created lottery was to establish a joint venture with state race tracks to provide Delaware with additional income. To effectuate this purpose, Delaware shares a portion of the lottery's revenue with Dover Downs to be applied to Dover Downs's harness racing purses under the direction of the Harness Racing Commission. *Id.* § 4815(b)(3) b.2. Thus, the recipients of harness racing purses are direct beneficiaries of money derived from the video lotteries jointly operated by the State and the race track. Furthermore, the State and Dover Downs also share jointly, although not equally, in the earnings generated by the video lottery.

Because of the entrepreneurial relationship that Delaware has established with Dover Downs, the State stands to gain and indeed receives substantial revenue. The direct stake of Delaware in the financial arrangements it established in 1993 with its race tracks is undisputed.

Finally, it must be noted that the State of Delaware is involved in Dover Downs' harness racing activities. There are many positions that Dover Downs is not permitted to fill without State approval. The Harness Racing Commission requires no fewer than 14 harness racing officials to be licensed[3] and it reserves the right to designate other positions that require licenses. Although Dover Downs pays and supervises these officials, the Commission's rules describe their duties and responsibilities in detail. Most importantly,

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3. The following individuals must be licensed by the HRC: state steward, board of judges, racing secretary, paddock judge, horse identifier and equipment checker, clerk of the course, official starter, official charter, official timer, photo finish technician, patrol judge, program director, State veterinarian, and LASIX veterinarian. (App. at 59).

the Commission's rules require Dover Downs not only to abide by, but also to "*enforce* the [Harness Racing] Act and the rules and orders of the Commission." (emphasis added).

In *Jackson*, the Supreme Court stated that the petitioner's case for state action would have been stronger if the private actor had "exercise[d] . . . some power delegated to it by the State which is traditionally associated with sovereignty." 419 U.S. at 352-53. The power to enforce laws is one such power, the delegation of which renders Dover Downs an arm of the Commission. Of course, heavy state regulation of a private entity alone does not necessarily give rise to a joint venture relationship. However, the undisputed facts here show a deliberate entwining and interdependence between the State and Dover Downs, not only in the operation of the State Lottery but also in the harness racing operations at the track. Since 1993, the State's concerns for the "economic activity and vitality" of the racetrack operation is a matter of statutory expression. The overall involvement of the State in the race track's affairs is manifest.

The majority analyzes the *Burton* rationale and concludes, especially in light of the Supreme Court decision in *Brentwood*, decided after the District Court's opinion and panel opinion in this case, that *Burton* must be limited to its unique facts. I find no fault with such limitations, especially since the *Brentwood* court carefully refrained from citing *Burton*. However, the facts in this case bear no resemblance to *Burton*. This is a much stronger case for the fair attribution of state action than was the case in *Burton*. Here, we have a joint venture of the State and Dover Downs in the operation of the video lottery and the harness racing track, not merely a symbiotic relationship.

Appendix A

This court has defined a joint venture as "an association of persons or corporations who by contract, express, or implied, agree to engage in a common enterprise for their mutual profit." *Richardson v. Walsh Constr. Co.*, 334 F.2d 334, 336 (3d Cir. 1964). The *Richardson* court further described the essential elements of a joint venture as: "(a) a joint proprietary interest in, and a right to mutual control over, the enterprise; (b) a contribution by each of the parties of capital, materials, services or knowledge; and (c) a right to participate in the expected profits." *Id.* A joint venture relationship may exist where parties engage in an undertaking without entering upon their business undertaking "as strict partners, but engage in a common enterprise for their mutual benefit." *First Mechs. Bank v. Comm'r of Internal Revenue*, 91 F.2d 275, 278 (3d Cir. 1937); *accord Plant-Erickson v. Ditter*, 24 A.2d 379, 381 (N.J. Ch. 1942). A modern definition of a joint venture and some of its incidents is set forth in the current edition of *Williston on Contracts:*

> "A joint venture is a special combination of two or more persons, whether corporate, individual or otherwise, formed for some specific venture in which a profit is jointly sought without the parties designating themselves as an actual partnership or corporation. The essence of the contract among the joint venturers is that it binds the coventurers. While, as between the parties themselves, a contract is essential for the creation of a joint venture, this is not necessarily so as to third persons; although the parties may never have intended to become joint venturers, under certain circumstances, they may be held estopped to deny

> their participation in a joint venture, and all members of the joint venture will be held jointly and severally liable on its contracts."

12 Richard A. Lord, *Williston on Contracts* § 36:9 (4th ed. 1999) (footnotes omitted). Thus, in *Tompkins v. Commissioner of Internal Revenue*, 97 F.2d 396 (4th Cir. 1938), the Court of Appeals applied essentially the same definition and held that an arrangement between a partnership and a corporation in a specific transaction constituted a joint venture between the partnership and the corporation. The court concluded that the agreement between the partnership and corporation "fulfilled all the requisites of a joint venture although informal and [ ] never reduced to writing." *Id.* at 399.

In *Irvis*, the Supreme Court observed that although Pennsylvania engaged in extreme and detailed regulation of private clubs, this was insufficient to make the Moose Lodge a state actor. 407 U.S. at 177. However, it intimated that had the relationship between the Lodge and the State been a partnership or joint venture, its decision would be different. *Id.* ("[The regulations cannot] be said to make the State . . . a partner or even a joint venturer.").

Similarly, in *Fitzgerald*, we did not find that the heavy state regulation of race tracks amounted to a symbiotic relationship between the race track and the state, but we noted that the result would have been different had the race track in its operations been a "veritable partner with the state." 607 F.2d at 595. Under such circumstances, "it seems proper to hold such enterprise subject to the same constitutional requirements to which the state is accountable." *Id.* (quoting *Braden*, 552 F.2d at 958). We have such a situation here.

Appendix A

The majority draws a comparison between *Fitzgerald* and this case. The only basis for comparison is that both involve horse harness racing activities that are state regulated. The majority notes that in *Fitzgerald* we concluded that the state was not a "joint venturer." However, *Fitzgerald* is vastly different from this case. *Fitzgerald* did not have slot machines; there was no sharing of profits; the track was not a state agent in the operation of the slot machines, in the collection of the proceeds and in transmitting them to the state; the state and the race track did not commit their separately owned property to the joint enterprise; the state did not use monies generated by the video lottery to cross-fertilize the horse racing activities; and there was no lottery and no joint venture.

The majority acknowledges "that Dover Downs' video lottery and racing activities should be considered together." (Maj. op. at 237). However, the majority ignores the financial structure created by the HRRA. The majority summarily concludes that "Delaware was not conducting any operation together with the race track at Dover Downs. It was not operating a mutually beneficial business there." (Maj. op. at 18). These conclusions are the backbone of the majority's decision but the facts and the HRRA are to the contrary.

Delaware transformed the regulatory structure of its relationship with Dover Downs in 1993 when it enacted the Horse Racing Redevelopment Act. One purpose of the Act is "to establish a state-operated lottery . . . which will produce the greatest income for the State." Del.Code Ann. tit. 29, § 4801(a). A second purpose is to provide "*nonstate supported assistance* in the form of increased economic activity and

vitality for Delaware's harness and thoroughbred horse racing industries, which activity and vitality will enable the industry to improve its facilities and . . . cause increased employment." *Id.* § 801(b)(1) (emphasis added).

The HRRA authorizes harness race tracks such as Dover Downs to operate slot machines on their premises. As I have stated above, the race track provides its premises, infrastructure, and organization for the enterprise, and the State provides the slot machines. The race tracks, as "video lottery agents," are responsible for securing and operating the machines and are free to determine the number of machines they choose to house, up to the statutory maximum of 1000. *Id.* § 4820.

The HRRA also provides for the distribution of the profits generated by the race tracks in the operation of the slot machines. Dover Downs is required to send all monies generated by the machines, net of payments to patrons, to an account controlled by the State Lottery Office. *Id.* § 4815(b). The monies received by this account are then distributed in accordance with the HRRA. First, the State pays the administrative costs associated with the operation of the lottery, including the salaries of state lottery personnel. Next, Gamblers Anonymous and similar programs receive a share. The State then splits the balance with Delaware race tracks, including Dover Downs. A large percentage of the remaining funds is distributed to racetracks such as Dover Downs "to be applied under the direction of the Delaware Thoroughbred Racing Commission for races conducted at such agent's racetrack." *Id.* § 4815(b)(3) b. Finally, Dover Downs, as a video lottery agent, receives a statutorily designated

"commission." *Id.* § 4815(b)(3)c. The State general fund receives the most substantial share of the profits. The flow of funds from the race track to the State is generated by the business arrangement under the HRRA between Delaware and the race track, not by state regulation of the industry. The relationship established is one that was obviously "mutually beneficial" and "conducted together." The majority's assertion to the contrary has no record support.

Under Delaware law, an arrangement between two individuals and a corporation to which each party made a definite contribution to the enterprise, shared in the profits, and had a proprietary interest in the venture, constitutes a joint venture. *J. Leo Johnson, Inc. v. Carmer*, 156 A.2d 499, 503 (Del. 1959). The State and Dover Downs are joint venturers, a "widely recognized legal relationship . . . of modern origin," *id.* at 502, in the operation of the race tracks.

More recently, in *In re McKinney-Ringham Corp.*, No. Civ.A. 15071, 1998 WL 118035 (Del. Ch. Feb. 27, 1998), a Delaware court found a relationship between one general partner and six limited partnerships a joint venture because they shared a community of interest between the managing entity, a right of each party to share in any profits, and a duty to share in the losses of the entity. The majority in this case baldly states that "the state was in [no] way putting its support behind the conduct of the private entity." (Maj. op. at 243). This ignores HRRA legislation specifically devised to rejuvenate the horse racing industry and enhance the State's Treasury. Operating the video lottery was indeed "a mutually beneficial business." In 1997, the net proceeds generated by the slot machines were $298.1 million, of which Delaware

received $152.3 million and Dover Downs received $90.13 million. In 1998, the net proceeds were $350.82 million, of which Delaware received $206 million and Dover Downs received $113.12 million. In the first ten months of 1999, the Delaware race tracks netted $351.67 million. With tens and hundreds of millions of dollars in proceeds raised annually by the State of Delaware and Dover Downs, they both enjoyed significant mutual benefits from the joint venture that enriched their coffers.

The majority's description of the financial arrangement between the State and the race tracks as a "subsidy" is inaccurate. This inaccuracy is highlighted by the HRRA which states that one of the purposes of the Act is to provide "nonstate supported assistance." *See ante* p. 33. A subsidy is a grant made by the government to any enterprise whose promotion is considered to be in the public interest. BLACK'S LAW DICTIONARY 1442 (7th ed. 1999). Delaware did not grant funds here. The payment of the administration expenses and salaries, the charitable contributions, and the split between the race tracks and the State of the monies earned in the enterprise were profits, not subsidies. The funds generated by Dover Downs are therefore "earned," (maj. op. at 11) not subsidized. Nor is there any basis for the majority's equivocal characterization of Dover Downs's relationship to the State "like a government contractor." (Maj. op. at 10).

In *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984), we again reviewed our decisions and recent decisions by the Supreme Court relating to state action. We concluded that *Braden* was still good law, that the Supreme Court had not developed a uniform test for

ascertaining state action and had even questioned whether such a unitary test was possible. *Id.* at 98. As in *Braden*, we held that the University was "in name and in fact" an instrumentality of the State. *Id.* at 103.

The majority concludes that our decisions in *Krynicky* and *Braden* "have limited relevance" to this case. I disagree. The majority reaches its conclusion because these decisions predate the Supreme Court's most recent pronouncement and because they involved universities that we held to be "instrumentalities" of the state. (Maj. op. at 22). Essentially, the issue there, although in an academic ambience far removed from horse racing tracks, was whether the participation of a state in an otherwise private activity was so significant that the acts of the seemingly private enterprise should be considered state action. That is the issue before us except that in this instance the relationship has more of the characteristics of the partnership asserted by the Crissmans rather than a private entity acting as a state instrumentality.

The *Braden* court observed that *Burton* and *Jackson* stand as two separate models of state action analysis designed by the Supreme Court. 552 F.2d at 958. What emerges from *Braden* and *Krynicky* is another model for state action, "state instrumentalities." The cases stand for the proposition that where a private enterprise stands as a "veritable partner" with the state in the operation of an educational institution, the enterprise is subject to the same constitutional requirements as the state. *Brentwood Academy v. Tennessee Secondary School Ass'n*, 531 U.S. 288 (2001), is yet another model. The applicability of each approach "rest[s] on the type of setting which may be present." *Braden*, 552 F.2d at 958.

Summarizing, the State of Delaware and Dover Downs engaged in a joint enterprise as a result of the relationship structured between them by the HRRA. Delaware's participation in and the financial benefits it derives from the operations are so significant that the acts of this seemingly private enterprise must be deemed state action for the purposes of Section 1983. Therefore, even though the State did not participate in the decision to expel or exclude the Crissmans, its relationship to Dover Downs as a joint venturer subjects the act of expulsion to constitutional standards. Accordingly, I would reverse the District Court's grant of summary judgment and remand this case for trial.

II.

Finally, the Crissmans ask this court to reverse the District Court's denial of their motion for a preliminary injunction. A court ruling on a motion for a preliminary injunction must consider the following four factors:

> whether the movant has shown a reasonable probability of success on the merits;
>
> whether the movant will be irreparably injured by denial of the relief;
>
> whether granting preliminary relief will result in even greater harm to the nonmoving party; and
>
> whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999) (quoting *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (en banc)). We review the denial of a preliminary injunction only for "an abuse of discretion, a clear error of law, or a clear mistake on the facts." *Id.* (internal quotations omitted).

I believe the Crissmans have a reasonable chance of succeeding on the merits because the State and Dover Downs are joint venturers, and the substantial evidence presented by the Crissmans supports their claim that they were denied due process of law.

All of the above factors cut in favor of the Crissmans. The Crissmans have suffered irreparable harm due to the denial of the injunction "because the nature of harness racing is such that no adequate remedy exists at law to compensate [them] for losses to income and reputation sustained from an unlawful suspension." *Fitzgerald*, 607 F.2d at 601. There is no evidence that Dover Downs would be harmed if the Crissmans, who are licensees in good standing with the Delaware Harness Racing Commission, were allowed to race. Finally, there is no evidence that the public would be adversely affected if the Crissmans were reinstated at Dover Downs. Thus, the District Court's denial of the Crissmans' motion for preliminary injunctive relief should be reversed.

III.

Accordingly, for the reasons set forth above, summary judgment in favor of Dover Downs, Inc. should be reversed and the case remanded to the District Court, with directions to grant plaintiffs' motion for preliminary injunctive relief, and for such further proceedings as are consistent with this opinion.

Judge McKEE joins in this dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5178

CHARLES CRISSMAN;
WENDY CRISSMAN;
*CHRISTINE CRISSMAN,

Appellants

v.

DOVER DOWNS ENTERTAINMENT INC.;
DOVER DOWNS, INC.

* (Dismissed as Party per Court's 11/8/2000 Order)

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 99-cv-00755)
District Judge: Honorable Roderick R. McKelvie

Originally Argued December 5, 2000
Before: McKEE, ROSENN and CUDAHY,** *Circuit Judges*

** Honorable Richard D. Cudahy, Senior Judge, United States Court of Appeals for Seventh Circuit, sitting by designation.

Appendix A

Reargued En Banc November 28, 2001
Before: BECKER, *Chief Judge*, SLOVITER, MANSMANN,*** SCIRICA, NYGAARD, ALITO, McKEE, RENDELL, BARRY, FUENTES, and ROSENN,
Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of Delaware and was reargued en banc on November 28, 2001. After careful review of the parties' arguments, it is hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered on February 17, 2000, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against the Appellants.

ATTEST:

s/ Kathleen Brown
Acting Clerk

Dated: 30 April 2002

*** The Honorable Carol Los Marismann participated in the argument and conference of the en banc court in this appeal, but she died before the filing of the judgment.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 25, 2001 GRANTING PETITION FOR REHEARING

Filed June 25, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5178

CHARLES CRISSMAN;
WENDY CRISSMAN;
*CHRISTINE CRISSMAN,

Appellants

v.

DOVER DOWNS ENTERTAINMENT INC.;
DOVER DOWNS, INC.

*(Dismissed as Party per Court's 11/8/2000 Order)

On Appeal From the United States District Court
for the District of Delaware
D.C. No. 99-cv-00755-RRM
District Judge: Honorable Roderick R. McKelvie

Appendix B

Argued: December 5, 2000.
Before: McKEE, ROSENN, and CUDAHY,*
Circuit Judges.

(Opinion Filed: January 29, 2001)

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, McKEE, RENDELL, BARRY, FUENTES, and ROSENN,** *Circuit Judges*

ORDER

A majority of the active judges having voted for rehearing *en banc* in the above appeal, it is ORDERED that the Clerk of this Court vacate the opinion and judgment filed January 29, 2001 and the Published Panel Opinion Sur Petition for Rehearing filed June 5, 2001, and list the above for rehearing *en banc* at the convenience of the Court.

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

DATED: 25 June 2001

A True Copy:
Teste:
Clerk of the United States Court of Appeals for the Third Circuit

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* Hon. Richard D. Cudahy, Senior Judge, United States Court of Appeals for the Seventh Circuit, Sitting by Designation.

** Judge Rosenn's vote is limited to panel rehearing only.

APPENDIX C — PANEL OPINION SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 5, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-5178

CHARLES CRISSMAN;
WENDY CRISSMAN;
*CHRISTINE CRISSMAN,

Appellants

v.

DOVER DOWNS ENTERTAINMENT INC.;
DOVER DOWNS, INC.

* (Dismissed as Party per Court's 11/8/2000 Order)

On Appeal from the United States District Court
for the District of Delaware
(C.A. No. 99-cv-00755)
District Judge: Honorable Roderick R. McKelvie

Argued: December 5, 2000

Before: McKEE, ROSENN and CUDAHY,*
Circuit Judges.

(Filed: June 5, 2001)

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* Honorable Richard D. Cudahy, Senior Judge, United States Court of Appeals for Seventh Circuit, Sitting by Designation.

Appendix C

PANEL OPINION SUR PETITION for REHEARING

ROSENN, Circuit Judge.

On February 12, 2001, Dover Downs, Appellee, filed a petition for rehearing and/or rehearing en banc. One week later (February 20, 2001) the Supreme Court of the United States rendered its decision in *Brentwood Academy v. Tennessee Secondary Schools Athletic Association*, 121 S.Ct. 924 (2001), which also presented an issue of state action. We entered an order directing the appellants to file an answer to the petition for rehearing, especially commenting on the *Brentwood Academy* case, and granting the petitioners ten days to reply thereto. The parties have responded and with supporting briefs. After, carefully considering them, the panel denies the petition for rehearing.

Unlike this case, which specifically deals with joint participants in the operation of a race track, *Brentwood Academy* concerned only the *regulatory* activities of a state-wide association, the Tennessee Secondary School Athletic Association (TSSAA), incorporated to regulate interscholastic competition among public and private secondary schools. The Association, according to the Court, includes most secondary public schools in the State and "has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority." *Id.* at 927.

The majority in *Brentwood Academy* made no references in its opinion to *Burton v. Wilmington Parking Authority*, 356 U.S. 715 (1961), or to a symbiotic relationship between the parties. This omission can be explained by the regulatory

nature of the challenged action, which raised a question more akin to that presented in *Jackson v. Metropolitan Edison Co.*[1] than in *Burton*. The Court held that the Association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state officials in the activities of the Association. *See Id.* at 927. This holding appears to expand the nexus test announced in *Jackson v. Metropolitan Edison Co.*, where the Court held that regulation of a private electric utility was not sufficient "to connect the State of Pennsylvania with [the Utility's] action so as to make the latter's conduct in terminating a customer's electricity account attributable to the State for purposes of the Fourteenth Amendment." *Id.* at 358.

The Court in *Brentwood Academy* never negated the vitality of *Burton*. Even the dissent pointed out that in *Brentwood* there was no 'symbiotic relationship' between the State and the TSSAA." (citing *Burton v. Wilmington Parking Auth.*). *Id.* at 939 (Thomas, J. dissenting). The dissent criticized the majority's "new entwinement test," *id.* at 940, stating that "there is no suggestion in this case, as was the case in *Burton*, that the State profits from the TSSAA decision to enforce its recruiting rule." *Id.* at 939.

Brentwood makes clear that the "entwinement test" for state action in that case is not the only test. It notes that the Court has identified "a host of facts" in other cases that bear on the fairness of attributing the challenged action to, the State, including "the operation of a private actor as a willful participant in joint activity with the State or its agents." *Id.* at 930. (quoting *Lugar v. Edmondson Oil*,

1. 419 U.S. 345 (1974).

451 U.S. 922 (1982)) The majority also refers to various situations in other cases which, in the past, the Court treated as state action. Examples include the State's exercise of "coercive power", or when the State provides "significant encouragement, either overt or covert." *Id.* at 929 (quoting *Blum v. Yeretsky*, 457 U.S. 991, 1004 (1982)). The Court also has treated a nominally private entity as a state actor "when it is controlled by an 'agency of the State,' " when it has been delegated a public function by the State, or where conduct that is "formally" private is "entwined with governmental policies or the government is entwined in its management or control." *Id.* at 930 (citations omitted). Thus, *Brentwood* makes clear that the entwinement test for state action in that case is only one of many. *Burton v. Wilmington Parking Auth.* is not rejected, abandoned, or modified. The dissent acknowledges that "[a]lthough we have used many different tests to identify State action, they all have a common purpose. Our goal in every case is to determine whether an action 'can be fairly attributed to the State.' " (citations omitted). *Id.* at 936.

The petitioner asserts that *Brentwood's* entwinement test supplants *Burton.* They attempt now to characterize the case before us as a regulatory action "which has never been sufficient to support a conclusion of 'state action.' " Reply Brief at 7. They argue that "there can be no contention that the State of Delaware, through either the State Lottery Commission or the Harness Racing Commission, is entwined with Dover Downs in a fashion which is even remotely similar to that prevailing in *Brentwood.*" Reply Brief at 7. We agree. These are two different cases subject to two different tests. Nevertheless, in both cases the activity reviewed constituted

state action under the Fourteenth Amendment. *Brentwood Academy* concerned only regulatory activities of an athletic association. In this case, we specifically noted that "[h]eavy state regulation alone of a private entity does not necessarily give rise to a *Burton* symbiotic relationship." Slip op. at 8. We also noted that the undisputed facts in this case show "a deliberate intertwining and interdependence between the State and Dover Downs; not only in the operation of the state lottery at the race track but also in the harness racing operations at the track. The State's concern in 'the economic activity and vitality' of the race track operation is a matter of statutory expression." Slip op. at 8-9.

Petitioner's argument that "the only connection between the State and Dover Down is regulatory" has no basis whatsoever on the record before us and we reject it.

The petition for rehearing also discusses cases never cited in the oral argument before us. They are inapposite. The first of these cases is *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). That case involved an allegation that the Olympic Committee had violated the Fifth Amendment[2] by enforcing its trademark over the word "Olympic" in a discriminatory manner. The entire state action discussion focused on the extent to which the government controlled the Olympic Committee's enforcement decisions. The court never undertook a symbiotic relationship analysis because there was no evidence

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2. Because the Olympic Committee was alleged to be a federal government actor, rather than a state actor, the Fifth Amendment's prohibition of discrimination applied, rather than the prohibition applied to the states by the Fourteenth Amendment.

in that case that the federal government was a joint participant in the Olympic Committee's enterprise. The record in Crissman, by contrast, was replete with evidence of joint participation in a business by the State of Delaware and Dover Downs.

Dover Downs argues that footnote 29 of *San Francisco Arts* "reformulates" Burton in a way that requires state participation in the challenged action as a *sine qua non* of state action. This reading is incorrect. The footnote simply rejects the argument that the federal government was a "joint participant" in the Olympic Committee's enforcement decisions and cites *Burton* for the proposition that joint participation is one way in which a private actor can be converted into a state actor. *See id.* at 546 n.29. This footnote does not modify Burton's central holding in any way. It simply underscores Burton's inapplicability to that case.

The second case, *American Manufacturers' Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), is even less germane here. In that case, the Court held that private insurers who provide workers' compensation coverage are not state actors even though they are subject to heavy regulation by the state. In so holding, the Court repeated the long settled proposition that extensive regulation alone does not convert a private entity into a state actor under *Burton*. *Id.* at 57. This language does not affect the holding of *Crissman*, where the evidence showed that the State did not simply regulate Dover Downs but also jointly participated in its enterprise and set up a financing scheme for Dover Downs from which it profited handsomely.

Finally, we also see no merit to Dover Downs's argument that this Court exceeded the scope of review by holding that the record evidence led conclusively to a finding of state action. Although Dover Downs argues that this court improperly "decide[d] disputed issues of material fact," it does not mention a single fact that was actually disputed. There was never any dispute over the facts in this case. The sole issue was whether the undisputed facts supported a finding of state action and whether the District Court correctly applied the law to the facts.

The petition for panel rehearing is denied.

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JANUARY 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5178

CHARLES CRISSMAN; WENDY CRISSMAN;
*CHRISTINE CRISSMAN,

Appellants,

v.

DOVER DOWNS ENTERTAINMENT INC.;
DOVER DOWNS, INC.

* (Dismissed as Party per Court's 11/8/2000 Order)

On Appeal From the United States District Court
for the District of Delaware
(C.A. No. 99-cv-00755)
District Judge: Honorable Roderick R. McKelvie

Argued: December 5, 2000

Before: McKEE, ROSENN, and CUDAHY,*
Circuit Judges.

(Filed: January 29, 2001)

* * *

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* Hon. Richard D. Cudahy, Senior Judge, United States Court of Appeals for the Seventh Circuit, Sitting by Designation.

Appendix D

ROSENN, *Circuit Judge.*

In this appeal, we return to familiar terrain to determine whether the expulsion of three state-licensed horse-trainers and horse owners by a privately owned harness racing association from its racetrack without a hearing constitutes state action for purposes of 42 U.S.C. § 1983.[1] The District Court concluded that no state action was present and granted summary judgment in favor of Dover Downs, the racetrack operator. Because the plaintiffs presented conclusive evidence that the track enjoyed a symbiotic relationship with the State of Delaware, we reverse.

I.

Appellee, Dover Downs, Inc. (Dover Downs), is a subsidiary of Dover Downs Entertainment Inc., a publicly held corporation operated for profit. Dover Downs is licensed by the Delaware Harness Racing Commission (HRC) to conduct harness races at its track in Dover, Delaware. It conducts harness racing meets six months out of every year, during which time no other track in Delaware holds harness racing meets.[2] Dover Downs also operates video lottery gambling and other entertainment activities at its facility.

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1. 42 U.S.C. § 1983 provides: "Every person who, under color of any . . . regulation . . . of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress."

2. Harrington Raceway, the only other licensed harness racing facility in Delaware, conducts races during the six months each year that Dover Downs does not.

Appendix D

Harness racing is a heavily regulated business in Delaware, as it is in most states. The State of Delaware plays an active role in the management of the harness racing operation at Dover Downs. The State requires that 14 harness racing officials assigned to Dover Downs, with titles ranging from "equipment checker" to "state veterinarian," be licensed by the HRC. Although Dover Downs pays and supervises these officials, HRC rules set forth their duties and job descriptions in detail. Moreover, HRC rules require Dover Downs to "enforce the [Harness Racing] Act and the rules and orders of the Commission."

In 1993, Delaware passed the "Horsemen's Revitalization Act," whose stated purpose was to rejuvenate the declining Delaware horse-racing industry. *See* 29 Del. C. § 4801(b)(1). To achieve this goal, the legislature authorized harness racetracks such as Dover Downs to operate "video lottery machines", commonly known as slot machines, on the premises. The State, rather than Dover Downs, owns or leases the slot machines, which are directly connected to the Delaware State Lottery Office for monitoring and control. *See* 29 Del. C. § 4819. Dover Downs, as a "video lottery agent," is responsible for securing and operating the machines, and is free to determine the number of machines it chooses to house, up to the statutory maximum of 1000 machines. *See* 29 Del. C. § 4820. Nonetheless, a Delaware statute plainly states that the video lottery is operated "by the State Lottery Office." 29 Del. C. § 4815(b)(2).

The State also exercises complete control over the distribution of revenue from the slot machines. A Delaware statute requires Dover Downs to send all revenue from the

lottery machines, net of payouts to patrons, to an account controlled by the State Lottery Office. *See* Del. C. § 4815(b). The funds received by this account are then distributed in accordance with Delaware statute, which is painstakingly specific. First, the State pays administrative costs associated with the operation of the lottery, including the salaries of state lottery personnel. Next, Gamblers Anonymous and similar programs receive a share. The State then receives a large percentage share of the money that remains. The statute then directs that a percentage of the remaining funds be given to racetracks such as Dover Downs "to be applied under the direction of the Delaware Harness Racing Commission to purses for races conducted at such agent's racetrack." 29 Del. C. § 4815. Finally, Dover Downs, as a video lottery agent, receives a statutorily designated "commission." *See* 29 Del. C. § 4815(b)(4) c & d.

Charles, Wendy, and Christine Crissman are, and at all relevant times have been, duly licensed by the state of Delaware to own and train race horses. In October 1997, Charles Lockhart, the newly-appointed general manager of Dover Downs, informed the Crissmans that they were no longer welcome at Dover Downs and that Dover Downs would no longer permit them to race horses there. Lockhart offered the Crissmans no explanation for their exclusion and no opportunity to be heard. Lockhart's deposition in this proceeding discloses that he expelled the Crissmans because he had heard unconfirmed rumors that the HRC was investigating Charles Crissman for certain alleged improprieties. Lockhart decided to exclude Wendy and Christine Crissman only because they had applied jointly with Charles Crissman to race at Dover Downs. The Crissmans,

however, were all licensed in good standing and there is no indication of record that they had violated Delaware's harness racing rules.[3]

The Crissmans filed suit against Dover Downs under 42 U.S.C. § 1983 in the United States District Court for the District of Delaware. The complaint alleged that Dover Downs had denied the plaintiffs due process of law in violation of the Fourteenth Amendment to the United States Constitution. The plaintiffs sought damages, as well as preliminary and permanent injunctive relief restraining the defendants from denying them access to the racetrack. When they filed their complaint, the Crissmans moved for a temporary restraining order. The District Court denied the motion, holding that the Crissmans were unlikely to prevail on the merits. Dover Downs then moved for summary judgment. The District Court granted the motion, holding that the Crissmans had failed to adduce sufficient evidence that Dover Downs acted under color of state law as required by 42 U.S.C. § 1983.

II.

The primary question presented by this lawsuit is whether Dover Downs' exclusion of the Crissmans constituted state action, a necessary element of a successful section 1983 suit. The starting point for our state action analysis is the seminal case of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961). In that case, the plaintiff sued a privately owned restaurant for racial discrimination.

3. On or about November 1, 2000, Christine Crissman stipulated to a dismissal of her appeal with prejudice.

The restaurant leased the land on which it stood from a state agency, which ran the adjacent public parking garage. After examining the close relationship between the restaurant and the state agency, the Supreme Court concluded that state action was present. The *Burton* Court enunciated a "symbiotic relationship" test. It provides that when the state has not clearly directed the private act of discrimination, but it "has so far insinuated itself into a position of interdependence" with the private actor, the state "must be recognized as a joint participant in the challenged activity." *Id.* at 725; *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 594 (3d Cir. 1979). The Court emphasized that "only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Id.* at 722.

The Court later refined the symbiotic relationship test in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972). There, the Court held state action to be absent in a case challenging racial discrimination by a private club that was heavily regulated by the Pennsylvania Liquor Control Board. The essence of the Court's holding was that extensive and detailed regulation of a private entity is generally insufficient to convert that entity into a state actor. *See id.* at 176-177. The Court distinguished the situation in *Moose Lodge* from that in *Burton* on the ground that, unlike the private restaurant in *Burton*, the Moose Lodge was a private club operating on private land and that the regulation of the Moose Lodge, detailed as it was in some particulars, could not be said "to in any way foster or encourage racial discrimination." *Id.* at 176-177. In addition, the court noted that, in spite of the regulation to which the State subjected

the Moose Lodge, the State could not be said to be "a partner or even a joint venturer in the club's enterprise." *Id.* at 177.

III.

Summary judgment is appropriate only when the record could not lead a reasonable jury to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The court making this determination must view the evidence in the light most favorable to the non-movant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Dover Downs attempts to portray its relationship to the State as one consisting solely of "regulations and revenue." Such a relationship is generally insufficient to constitute a symbiotic relationship under *Burton*. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1082 (2d Cir. 1990). However, we believe that the record in this case shows that the affairs of the State and the racetrack were much more than a regulatory relationship between the State and a private gambling enterprise. For instance, the slot machines used by Dover Downs, like the leased restaurant building in *Burton*, are the property of, or leased by, the State. *Cf. Fulton v. Hecht*, 545 F.2d 540, 542-43 (5th Cir. 1977) (finding symbiotic relationship absent and emphasizing that private party was not a lessee of state property). The State maintains control over these slot machines by directly connecting them to the central computer system at the State Lottery Office. In addition, and perhaps most important to the symbiotic relationship analysis, Dover Downs is the State's agent in

the video lottery enterprise. Because of this agency relationship, the State stands to gain or lose substantial revenue as a result of business decisions made by Dover Downs.[4] The situation here is even more striking than the symbiotic relationship found in *Burton*, where the State primarily acted as landlord to the privately-owned restaurant and had no direct stake in its financial success beyond its ability to pay rent.

Dover Downs urges this court to view the video lottery operation in which, Dover Downs concedes, the State is heavily involved, as separate from its harness-racing activities. It argues that, because the Crissmans were banned from participating in harness races, this court should only analyze the State's connection to Dover Downs' harness racing operation. This argument misses the point of the symbiotic relationship test,[5] which predicates state action not merely on its participation in the challenged conduct, but on the overall involvement of the State in the affairs of the private entity. *See Braden v. University of Pittsburgh*, 552 F.2d 948, 958 (3d Cir. 1977) (holding that symbiotic relationship test does not require that the state be involved in the challenged action). The purpose behind the *Burton*

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4. As it turns out, the stakes are quite high. In 1998, slot machines from Delaware's three video lottery agents brought $206 million into Delaware's General Fund.

5. Dover Downs' argument is more in tune with the "close nexus" test, articulated by the Supreme Court in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which held that, in the absence of a symbiotic relationship, state action may be found if the state was a participant in the challenged activity.

decision was to recognize a state as "a joint participant in the challenged activity" when it has "insinuated itself into a position of inter dependence with" the private actor. *Burton*, 365 U.S. at 725. When such a relationship of interdependence exists, a § 1983 plaintiff need not show state participation in the challenged activity. *See id.* at 958.

Moreover, Dover Downs' contention that we should ignore the State's involvement in the video lottery is not persuasive because the record reflects that video lottery is inextricably linked with Dover Downs' harness-racing operation. The State of Delaware created the video lottery for the express purpose of providing "assistance in the form of increased economic activity and vitality for Delaware's harness and thoroughbred horse racing industries, which activity and vitality will . . . cause increased employment." *See* 29 Del.C. § 4801(b)(1). Under Delaware law, Dover Downs would not be permitted to operate a video lottery if it did not conduct harness racing meets. *See* 29 Del. C. § 4819(a). To effectuate the stated purpose of the statute, Delaware gives a portion of the lottery's revenue to Dover Downs to be applied to harness racing purses "under the direction of the Delaware Harness Racing Commission." 29 Del. C. § 4815(b)(3) b.2. Thus, the recipients of harness racing purses are direct beneficiaries of revenues derived from the video lotteries jointly operated by the State and the race track. Furthermore, Dover Downs also specifically participates in the revenues generated by the video lottery.

Finally, we note that the State of Delaware is involved in Dover Downs' harness racing activities. There are many positions which Dover Downs is not permitted to fill without

State approval. The HRC requires no fewer than 14 harness racing officials to be licensed[6] and it reserves the right to designate other positions that require licenses. Although Dover Downs pays and supervises these officials, HRC rules describe their duties and responsibilities in detail. Most importantly, HRC rules require Dover Downs not only to abide by, but also to "*enforce* the [Harness Racing] Act and the rules and orders of the Commission." (App. at 67) (emphasis added). In *Jackson*, the Supreme Court stated that the petitioner's case for state action would have been stronger if the private actor had "exercise[d] . . . some power delegated to it by the State which is traditionally associated with sovereignty." *Jackson*, 419 U.S. at 352-53. The power to enforce laws is one such power, the delegation of which converts Dover Downs into an executive arm of the HRC. Of course, heavy state regulation alone of a private entity does not necessarily give rise to a *Burton* symbiotic relationship. However, the undisputed facts here show such a deliberate entwining and interdependence between the State and Dover Downs, not only in the operation of the State Lottery but also in the harness racing operations at the track. The State's concerns in the "economic activity and vitality" of the racetrack operation is a matter of statutory expression. The overall involvement of the State in the affairs of the race track is manifest. We reject, therefore, Dover Downs' arguments that the State specifically must be involved in the challenged activity or that the lottery activities can be insulated from the race track operations.

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6. The following individuals must be licensed by the HRC: state steward, board of judges, racing secretary, paddock judge, horse identifier and equipment checker, clerk of the course, official starter, official charter, official timer, photo finish technician, patrol judge, program director, State veterinarian, and LASIX veterinarian. (App. at 59).

For all of the reasons discussed above, the Crissmans have established that a symbiotic relationship exists between Delaware and Dover Downs. The District Court's grant of summary judgment for Dover Downs on the state action issue will therefore be reversed.

IV.

Our inquiry does not end with the state action analysis because, even if state action is present, the Crissmans must also demonstrate a triable issue of material fact as to whether their constitutional right to Due Process was violated. We must now consider whether the Crissmans made such a showing, a question which the District Court did not address.

In *Fitzgerald v. Mountain Laurel Racing*, *supra*, this Court held that a horse trainer who had been summarily evicted from the track where he previously raced had made out a case of deprivation of due process. This court recognized that "Fitzgerald had a liberty interest in his employment reputation protected by the Due Process Clause of the fourteenth amendment." *Id.* The court further noted his liberty interest in earning a livelihood, stating,

> Mountain Laurel had officially recognized Fitzgerald's status as a state licensed trainer and driver by allowing him to perform these activities at the track. His summary expulsion significantly altered a 'status previously recognized by state law' and denied him the opportunity of earning a livelihood. We, therefore, agree that Fitzgerald has a cognizable liberty interest.

Id., quoting *Paul v. Davis*, 424 U.S. 693, 711 (1976).

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The facts of this case bear considerable similarity to those in *Fitzgerald*. Like Fitzgerald, the Crissmans are and have been at all relevant times, licensed by the state of Delaware to train and race horses. Prior to the challenged expulsion, Dover Downs had recognized that status by allowing them to race their horses there. Moreover, the expulsion "significantly altered a status previously recognized by state law" by prohibiting them from using their Delaware racing licenses during the six months each year when Dover Downs conducts the only harness racing meets in the state.

Dover Downs argues that it "has not taken any action to impede Appellants from pursuing their employment at any other track."[7] However, it is not necessary under *Fitzgerald* for the Crissmans to prove that they can no longer race anywhere in order to make out a § 1983 case. Fitzgerald, like the Crissmans, was only evicted from one track. There

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7. Dover Downs cites *Greene v. McElroy*, 360 U.S. 474 (1959) as support for the proposition that the denial of an employment opportunity does not amount to a liberty or property right unless the plaintiff is entirely deprived of his ability to earn a living in his chosen profession. However, *Greene* erects no such barrier to Due Process claims based on the denial of employment opportunities. Rather, it merely noted that in that case, the plaintiff's career had been "seriously affected, if not destroyed" by the government's action. *Id.* at 492. It then stated that the right "to follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concepts of the Fifth Amendment." *Id.* at 492. It is consistent with *Greene* to hold that eviction from a track in a state where one is licensed to race constitutes an unreasonable interference with the pursuit of one's chosen profession, particularly when that track is the only place in the state that one can practice one's profession from November through April.

is nothing in the opinion to indicate that he was banned from racing anywhere or even that he was banned from racing throughout Pennsylvania. Although the Crissmans are still free to race their horses at Harrington Raceway and at tracks in other states, their Delaware racing licenses are of no use to them for half of every year because of Dover Downs' summary expulsion.

Dover Downs also disputes whether the Crissmans' reputations were damaged by their exclusion from the track. It accurately points out that, in *Fitzgerald*, a Pennsylvania Racing Commission Rule required the track to notify the Commission of all people excluded therefrom. Delaware, it seems, has no comparable regulation. Dover Downs seizes on this distinction and maintains that, except to the extent that the Crissmans themselves publicized their exclusion, their reputations have not been damaged by this incident. On the other hand, their exclusion in all probability would be known to the other owners and trainers of race horses at the Dover Downs track, and those associated with them. In our view, the Crissmans have presented sufficient evidence to warrant trial on this issue.

Dover Downs acknowledges that the HRC was notified orally of the Crissmans' expulsion. Although Dover Downs tries to downplay the significance of this notification, *Fitzgerald* held that the notification of the relevant regulatory agency amounts to a deprivation of the plaintiff's liberty interest in his employment reputation. *See Fitzgerald*, 607 F.2d at 602. Moreover, Charles Lockhart's deposition reveals that this notification was only given after an HRC employee asked him whether Mr. Crissman had been excluded from

the track. Apparently, the HRC agent asked "because he had heard that [Crissman] had been [excluded]." (App. at 260). This testimony demonstrates that the expulsion of the Crissmans from Dover Downs has, at some point, been the subject of conversation in Delaware harness racing circles. Although it remains possible that the Crissmans themselves are primarily responsible for the publicity surrounding their exclusion, we believe, viewing the evidence in the light most favorable to the Crissmans, that there is a genuine issue of fact as to whether Dover Downs' expulsion adversely affected their reputation.

We conclude that the Crissmans have presented a triable issue of fact as to whether their expulsion from Dover Downs amounted to a deprivation of a liberty interest cognizable under § 1983 and an injury to their liberty interest in employment reputation. The question then remains whether they received due process of law. Under *Fitzgerald*, a suspended harness racing trainer is entitled, at the very least, to a reasonably prompt post-suspension hearing. *See Fitzgerald*, 607 F.2d at 603. It is undisputed that the Crissmans never received any hearing. Accordingly, the District Court erred in granting summary judgment for Dover Downs and we will remand this case for trial.

V.

Finally, the Crissmans ask this court to reverse the District Court's denial of their motion for a preliminary injunction. A court ruling on a motion for a preliminary injunction must consider the following four factors:

> 1) whether the movant has shown a reasonable probability of success on the merits; 2) whether the

> movant will be irreparably injured by denial of the relief; 3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and 4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999). We review the denial of a preliminary injunction only for "an abuse of discretion, a clear error of law, or a clear mistake on the facts." *Id.*

In light of our determination that a symbiotic relationship existed between the State of Delaware and Dover Downs and based on substantial evidence presented by the Crissmans that they were denied due process of law, we believe they had a reasonable chance of succeeding on the merits.

The other three factors also cut in favor of the Crissmans. The Crissmans have suffered irreparable harm due to the denial of the injunction "because the nature of harness racing is such that no adequate remedy exists at law to compensate [them] for losses to income and reputation sustained from an unlawful suspension." *Fitzgerald*, 607 F.2d at 601. There is no evidence that Dover Downs would be harmed if the Crissmans were allowed to race. Finally, there is no evidence that the public would be adversely affected if the Crissmans were reinstated at Dover Downs. Thus, the District Court's denial of the Crissmans' motion for preliminary injunctive relief will be reversed.

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VI.

Accordingly, for the reasons set forth above, summary judgment in favor of Dover Downs, Inc. will be reversed and the case remanded to the District Court, with directions to grant plaintiffs' motion for preliminary injunctive relief, and for such further proceedings as are consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5178

CHARLES CRISSMAN;
WENDY CRISSMAN;
*CHRISTINE CRISSMAN,

Appellants,

v.

DOVER DOWNS ENTERTAINMENT INC.;
DOVER DOWNS, INC.

* (Dismissed as Party per Court's 11/8/2000 Order)

On Appeal From the United States District Court
For District of Delaware
(D.C. No.: 99-cv-00755)
District Judge: Roderick R McKelvie

Argued: Tuesday, December 5, 2000.

Before: MCKEE, ROSENN, and CUDAHY,*
Circuit Judge.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of Delaware.

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* Hon. Richard D. Cudahy, Senior Judge, United States Court of Appeals for the Seventh Circuit, Sitting by Designation.

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On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the summary judgment of the District Court entered February 17, 2000 will be reversed, and the case remanded to the District Court with directions to grant plaintiffs' motion for preliminary injunctive relief, and for such further proceedings as are consistent with this opinion. All of the above in accordance with the opinion of this Court. Costs taxed against the appellee.

ATTEST:

s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: 29 January 2001

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED FEBRUARY 18, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 99-755-RRM

CHARLES CRISSMAN, WENDY CRISSMAN and CHRISTINE CRISSMAN,

Plaintiffs,

v.

DOVER DOWNS, INC.

Defendant.

JUDGMENT

For the reasons set forth by the court in its February 17, 2000 opinion and order,

IT IS HEREBY ORDERED and ADJUDGED that judgment is entered pursuant to Federal Rule of Civil Procedure 58 in favor of defendant Dover Downs and against the plaintiffs, Charles Crissman, Wendy Crissman and Christine Crissman, on the claims in plaintiffs' amended complaint.

s/ [illegible]
DEPUTY CLERK

February 18, 2000

APPENDIX F — OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED FEBRUARY 17, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 99-755-RRM

CHARLES CRISSMAN, WENDY CRISSMAN and CHRISTINE CRISSMAN,

Plaintiffs,

v.

DOVER DOWNS, INC.

Defendant.

OPINION

McKELVIE, District Judge.

This is a civil rights case. Plaintiffs Charles Crissman, Wendy Crissman and Christine Crissman (collectively, the "Crissmans") are Delaware citizens who own and train harness racing horses. Defendant Dover Downs, Inc. ("Dover Downs") is a Delaware corporation that operates a harness racing facility in Dover, Delaware.

Appendix F

On November 5, 1999, the Crissmans filed a complaint under 42 U.S.C. § 1983, alleging that Dover Downs violated their Fourteenth Amendment rights to due process by excluding them from the Dover Downs harness racing facility. The Crissmans moved for a preliminary injunction. On November 9, 1999, Dover Downs filed a cross-motion for summary judgment alleging that there is no evidence that Dover Downs acted under color of state law as required in a section 1983 action.

The parties have completed briefing on the motions and the court heard oral argument on November 29, 1999. This is the court's decision on the motions.

I. *FACTS AND PROCEDURAL BACKGROUND*

The court draws the following facts from the affidavits, documents and deposition transcripts submitted by the parties.

A. *The Parties*

1. *The Crissman Plaintiffs*

Plaintiffs Charles Crissman, Wendy Crissman and Christine Crissman are Delaware citizens who derive all of their earnings from harness racing. The Crissmans are licensed by the Delaware Harness Racing Commission (the "Commission") as owners and trainers of harness racing horses.

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2. *Defendant Dover Downs*

Defendant Dover Downs is a subsidiary of Dover Downs Entertainment, Inc., the owner of several horse and automobile racetracks throughout the United States. Dover Downs operates a harness racing facility in Dover, Delaware and is duly licensed by the Commission. Additionally, Dover Downs operates video lotteries at its harness racing facility, as authorized by 29 Del. C. § 4819.

Harrington Raceway in Harrington, Delaware is the only other harness racing facility that is currently authorized by the Commission.

B. *Exclusion of the Crissmans*

In October 1997, Charles B. Lockhart, Executive Assistant to the President of Dover Downs, decided to exclude the Crissmans from racing at Dover Downs. Lockhart prepared a one sentence letter which the President of Dover Downs, Denis McGlynn, signed and sent to each of the Crissmans. "This letter is to inform you that as of this date you are not welcome on the premises of Dover Downs nor will Dover Downs be accepting any horses owned or trained by you."

At his deposition, Lockhart testified that he decided to exclude the Crissmans in part because he heard that Charles Crissman was under investigation by the state for false ownership of horses. Lockhart also testified that he heard rumors that Crissman had financial problems and that his horses had tested positive for drug use. Lockhart stated,

"it was not my job to prove that each and every one of those [rumors] were true. It really made no difference whether they were. We made a decision based on what we believed was the best interest of Dover Downs."

In November 1997, a state investigator named Robert Collison asked Lockhart if Dover Downs had excluded the Crissmans from its facility. Lockhart testified that he told Collison the Crissmans had been excluded. Collison then informed Lockhart that Charles Crissman was under investigation by the Commission.

In addition to the Crissmans, at any given time, there are approximately 27 other individuals that Dover Downs excludes from its harness racing facility. Dover Downs reports its decisions to exclude individuals to the Commission in accordance with Commission policy. Although excluded from harness racing at Dover Downs, the Crissmans retain their licenses from the Commission to own and train harness racing horses in Delaware.

C. *The Lawsuit*

After trying unsuccessfully to get Dover Downs to reinstate their racing privileges, on November 5, 1999, the Crissmans filed this action under 42 U.S.C. § 1983 for injunctive and monetary relief.[1] The Crissmans allege that Dover Downs

1. The Crissmans originally filed their complaint against the parent corporation, Dover Downs Entertainment, Inc. On December 20, 1999, the court granted a stipulation by the parties to allow the Crissmans to amend their complaint. Dover Downs is the sole defendant on the amended complaint.

violated their rights to due process under the Fourteenth Amendment by excluding them from the Dover Downs harness racing facility.

On the same day that the Crissmans filed their complaint, they moved for a temporary restraining order enjoining Dover Downs from excluding them from the harness racing facility. On November 9, 1999, the court heard oral argument on the motion. The court found that the Crissmans were unlikely to prevail on the merits because the Crissmans failed to present evidence that Dover Downs acted under color of state law, as required under 42 U.S.C. § 1983. The court denied the motion for a temporary restraining order.

The Crissmans also moved for a preliminary injunction to enjoin Dover Downs from excluding them from the harness racing facility. On November 9, 1999, Dover Downs filed a cross-motion for summary judgment, alleging that there is no evidence of state action. Dover Downs contends that as a private racetrack owner, it retains the ability to exclude participants and patrons from its facility.

On November 29, 1999, after the Crissmans had taken certain discovery, the court heard oral argument on both motions. After the hearing, the court invited the Crissmans to submit additional evidence in response to the motion for summary judgment in order to show that Dover Downs acted under color of state law for purposes of the Fourteenth Amendment. On December 15, 1999, the parties submitted a Stipulation of Undisputed Facts.

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II. *DISCUSSION*

A. *Legal Standard for Summary Judgment*

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of demonstrating the absence of material issues of fact. *Id.* at 323. When deciding a motion for summary judgment, the court views the facts, and all permissible inferences from those facts, in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Where the record could not lead a reasonable jury to find for the non-moving party, disposition by summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

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B. *Did Dover Downs Act Under Color of State Law?*

To maintain a cause of action under 42 U.S.C. § 1983, the Crissmans must establish that Dover Downs violated their constitutional rights and that the violation was committed under color of state law. 42 U.S.C. § 1983.[2] Private conduct may amount to state action in two instances. First, where the state has "so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant," this "symbiotic relationship" is sufficient to make the actions of a private party attributable to the state. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Second, state action may exist when "there is a sufficiently close nexus between the State and the challenged action" that the private party's action "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

In this case, the Crissmans allege that the actions of Dover Downs are attributable to the state under both the symbiotic relationship test and the close nexus test.

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2. 42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Appendix F

1. *Symbiotic Relationship*

The Crissmans argue that the harness racing in Delaware is a joint venture between the Commission and Dover Downs. The Crissmans point to the extensive regulation of harness racing in Delaware which they argue "inextricably intertwines" Dover Downs and the Commission. Moreover, the Crissmans contend that Dover Downs acted under color of state law because the state has a direct financial stake in video lotteries at Dover Downs that generate revenue for the state each year.

Dover Downs counters that there is no evidence of state action. Dover Downs argues that as a private racetrack owner, it retains the ability to exclude participants and patrons from its facility. For purposes of the summary judgment motion, Dover Downs does not dispute the facts set forth by the Crissmans. Dover Downs concedes that harness racing at Dover Downs is extensively regulated by the state and produces significant revenue for the state. Dover Downs contends, however, that those facts are not sufficient to establish state action under the symbiotic relationship test.

The Supreme Court first articulated the symbiotic relationship test in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In that case, a private restaurant located in a state-owned building refused to serve a black customer. The Court held that there was state action in part because the restaurant was a lessee of the state agency that owned the building. In addition, the state agency was responsible for upkeep and maintenance of the building and it provided heat and gas service to the restaurant. The Court stated:

> Addition of all these activities, obligations and responsibilities of the [state agency], the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of the public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.

365 U.S. at 724. The Court held that the state had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant." *Id.*

In this case, the Commission has not "so far insinuated itself into a position of interdependence" with Dover Downs that it must be recognized as a joint participant in harness racing. Dover Downs is a privately-owned harness racing facility. While harness racing is subject to substantial regulation, that fact alone does not make Dover Downs a state actor. *See Jackson*, 419 U.S. at 350 ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."). Moreover, the revenues generated by the state from harness racing and video lotteries do not create a symbiotic relationship of the sort which makes Dover Downs' conduct state action. *See Roberts v. Louisiana Downs, Inc.*, 742 F.2d 221, 225 (5th Cir. 1984) (finding that receipt of substantial revenues by the state from horse racing does not create a symbiotic relationship). Therefore, the actions of Dover Downs do not qualify as state action under the symbiotic relationship test.

2. *Close Nexus*

Crissmans also contend that Dover Downs acted under color of state law because there is a sufficiently "close nexus" between the Commission and harness racing. The Crissmans argue that Lockhart and Collison, the state official who was investigating Crissman, conspired to exclude the Crissmans from harness racing. Furthermore, the Crissmans contend that the Commission exercises sufficient control over harness racing through its regulatory power to make the actions of Dover Downs attributable to the state for Fourteenth Amendment purposes.

Dover Downs counters that the close nexus test is not met in this case because there is no evidence that state officials participated in the decision by Dover Downs to exclude the Crissmans. Dover Downs argues that it did not consult with the Commission regarding its decision to exclude the Crissmans. Finally, Dover Downs contends that the state's regulation of harness racing is not sufficient evidence of state action under the close nexus test.

The Supreme Court established the close nexus test in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In that case, Jackson's electricity service was terminated by Metropolitan Edison because Jackson had not paid her electric bills. Jackson claimed that she was entitled to notice and a hearing under 42 U.S.C. § 1983 before her service could be terminated. The Court acknowledged that Metropolitan Edison was a heavily regulated, privately owned utility, enjoying at least a partial monopoly as an electricity provider and that it elected to terminate Jackson's service in a

manner which the state found permissible. 419 U.S. at 358. Nonetheless, the Court held that these factors were insufficient to establish a "close nexus" between the utility and the state such that the utility's action may be attributable to the state. *Id.*

In this case, the Crissmans have not presented evidence that the Commission specifically authorized or directed Dover Downs to exclude the Crissmans. Lockhart acknowledged that a state official told him that Crissman was under investigation but Lockhart testified that he made the decision to exclude the Crissmans before he spoke to Collison. There was no direct communication between the Commission and Dover Downs concerning the exclusion. To this day, the Commission has not taken disciplinary action against the Crissmans.

Admittedly, the Commission has extensive regulatory control over harness racing in Delaware. Nonetheless, the *Jackson* Court held that regulatory control, even if "extensive and detailed" does not establish a "close nexus" between the private entity and the state, such that the private entity's action may be attributable to the state. 419 U.S. at 350. Furthermore, mere licensing by the state is not sufficient to establish state action. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-72 (1072). Therefore, the court finds that the actions of Dover Downs do not qualify as state action for purposes of the Fourteenth Amendment.

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As set forth above, the Crissmans have failed to offer evidence that Dover Downs acted under color of state law as required for a section 1983 claim. Therefore, the court will grant summary judgment in favor of Dover Downs on the claims in the Crissmans' amended complaint.

The court will issue an order in accordance with this opinion.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 99-755-RRM

CHARLES CRISSMAN, WENDY CRISSMAN and CHRISTINE CRISSMAN,

Plaintiffs,

v.

DOVER DOWNS, INC.

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

For the reasons set forth by the court in its February 17, 2000 opinion,

IT IS HEREBY ORDERED as follows,

1. Defendant Dover Downs' Motion for Summary Judgment (Docket Item 6) is granted.

2. The clerk shall enter judgment pursuant to Federal Rule of Civil Procedure 58 in favor of defendant Dover Downs and against the plaintiffs, Charles Crissman, Wendy Crissman and Christine Crissman, on the claims in plaintiffs' amended complaint.

Appendix F

s/ [illegible]
UNITED STATES DISTRICT JUDGE

February 17, 2000

APPENDIX G — STATUTORY PROVISIONS INVOLVED

DELAWARE CODE
CONSTITUTION OF THE STATE OF DELAWARE
ARTICLE II. LEGISLATURE

Del.C. Const. Art. II, § 17

§ 17. Lotteries and other gambling

Section 17. All forms of gambling are prohibited in this State except the following:

(a) Lotteries under State control for the purpose of raising funds.

* * *

Appendix G

DELAWARE CODE
TITLE 3. AGRICULTURE
PART X. HARNESS RACING
CHAPTER 100. HARNESS RACING
SUBCHAPTER II. LICENSE TO CONDUCT HARNESS RACING MEET; TAXES

3 Del.C. § 10023

§ 10023. Application; rejection; award of dates and maximum racing days; qualifications for license

* * *

(c) The Commission shall, on or before the 15th of September of the year preceding that for which a license is desired, award all dates for harness horse racing in this State for the succeeding year.

* * *

Appendix G

DELAWARE CODE
TITLE 3. AGRICULTURE
PART X. HARNESS RACING
CHAPTER 100. HARNESS RACING
SUBCHAPTER III. REGULATORY PROVISIONS, OFFENSES AND PENALTIES

3 Del.C. § 10048

§ 10048. Restrictions on licensee acting as video lottery agent

During any calendar year in which a licensee under this chapter has also been licensed by the Director of the State Lottery Office to maintain video lottery machines within the confines of a racetrack licensed under this chapter, the following rules shall apply:

(1)a. As to each racetrack so licensed by the Director of the State Lottery Office, the licensee shall, at a minimum, subject to the availability of racing stock, force majeure, casualty, and other circumstances beyond the reasonable control of the licensee, conduct live harness horse races on:

1. At least 80 days if the licensee conducted more than 40 days of live harness horse races during 1992, or

2. At least 60 days if the licensee conducted 40 or fewer days of live harness horse races during 1992.

* * *

(2) An amount calculated pursuant to § 4815(b)(3) of Title 29 shall be added to the purses for the races to be held at the licensee's racetrack. The allocation of said sums among the races to be held at the licensee's racetrack shall be in accordance with contracts currently in force with the Horsemen's Association recognized for purposes related to the allocation of purses, if applicable; provided, that all such sums shall have been allocated no later than the end of the calendar year immediately following the calendar year of receipt of said sums by the licensee.

Appendix G

DELAWARE CODE
TITLE 29. STATE GOVERNMENT
PART IV. STATE AGENCIES AND OFFICES NOT CREATED BY CONSTITUTION
CHAPTER 48. LOTTERIES
SUBCHAPTER I. STATE LOTTERY

29 Del.C. § 4801

§ 4801. Statement of purpose.

(a) It is the purpose of this subchapter to establish a state-operated lottery under the supervision of a Director who shall be appointed by the Secretary of Finance with the written approval of the Governor and hold broad authority to administer the system in a manner which will produce the greatest income for the State.

(b) In authorizing a video lottery, it is the further purpose of the General Assembly to:

(1) Provide nonstate supported assistance in the form of increased economic activity and vitality for Delaware's harness and thoroughbred horse racing industries, which activity and vitality will enable the industry to improve its facilities and breeding stock, and cause increased employment; and

(2) Restrict the location of such lottery to locations where wagering is already permitted and controls exist.

Appendix G

DELAWARE CODE
TITLE 29. STATE GOVERNMENT
PART IV. STATE AGENCIES AND OFFICES
NOT CREATED BY CONSTITUTION
CHAPTER 48. LOTTERIES
SUBCHAPTER I. STATE LOTTERY

29 Del.C. § 4805

§ 4805. Director — Powers and duties

* * *

(b) The Director shall also have the power and it shall be the Director's duty to:

(13) License as video lottery agents each person, corporation or association which, in 1993, held either a horse racing meet pursuant to Title 3 or Title 28 or a harness horse racing meet pursuant to Title 3 and who satisfies such fitness and background standards as the Director may promulgate pursuant to subsection (a)(16) of this section. In the event that there shall have been or shall be a change of ownership or such person, corporation or association after the close of the 1993 racing meet then the issuance by the Director of a license to serve as a video lottery agent shall be conditioned upon the Director's determination that such person, corporation or association shall have met the requirements of § 4806(a)(1)-(4) and (b) of this

title and satisfies such fitness and background standards as the Director may promulgate pursuant to subsection (a)(16) of this section. Change of ownership occurring after the Director has issued a license shall automatically terminate the license 90 days thereafter unless the Director has determined after application to issue a license to the new owner(s) because the new owner(s) have met the requirements of § 4806(a)(1)-(4) and (b) of this title and satisfied such fitness and background standards as the Director may promulgate pursuant to subsection (a)(16) of this section. Any license granted pursuant to this subsection is a privilege personal to the video lottery agent and is not a legal right. A license granted or renewed pursuant to this subsection may not be transferred or assigned to another person, nor may a license be pledged as collateral. For purposes of this subsection, "a change of ownership" shall have occurred if more than 20 percent of the legal or beneficial interests in such person, corporation or association shall be transferred, whether by direct or indirect means.

* * *

Appendix G

DELAWARE CODE
TITLE 29. STATE GOVERNMENT
PART IV. STATE AGENCIES AND OFFICES NOT CREATED BY CONSTITUTION
CHAPTER 48. LOTTERIES
SUBCHAPTER I. STATE LOTTERY

29 Del.C. § 4815

§ 4815. State Lottery Fund

* * *

(b) All proceeds, net of proceeds returned to players pursuant to paragraph (1) of this subsection, from the operation of the video lottery shall be electronically transferred daily or weekly at the discretion of the Lottery Director into a designated State Lottery account by the agent, and transferred to the State Lottery Fund by the Lottery on a daily or weekly basis and shall be applied as follows:

(1) *Proceeds returned to players.* — A portion of such proceeds, but not less than 87% of the total proceeds on an average annual basis received from the operation of a video lottery, shall be retained by and returned to the players under rules prescribed by the Director. Proceeds returned to players in excess of the payout authorized pursuant to § 4805(a)(15) of this title shall be the sole responsibility of the

video lottery agent and the State Lottery's proceeds shall not be reduced on account of such excess payment.

(2) *Proceeds returned to the State.* — Of amounts remaining after all payments to players under paragraph (1) of this subsection, there shall be returned to the State:

a. 12.5% of the average daily win (the amount remaining after all payments to players) not exceeding $25,000;

b. 15% of the average daily win exceeding $25,000 but not in excess of $50,000;

c. 20% of average daily win exceeding $50,000 but not in excess of $75,000; and

d. 30% of average daily win in excess of $75,000.

The funds retained by the State Lottery shall be applied as follows: first, to the administrative costs and expenses in respect of the video lottery including, but not limited to, administrative expenses including payroll and other employment costs attributable to the operation of the video lottery by the State Lottery Office, law-enforcement and security expenses,

including payroll and other employment costs of the State Lottery, the Office of the Attorney General and the Delaware State Police, attributable to the operation by the State Lottery of a video lottery; second, $100,000 or 1%, whichever is greater, of the proceeds distributed under (b)(2)a.-d. of this section, to the Division of Substance Abuse and Mental Health of the Department of Health and Social Services for funding programs for the treatment, education and assistance of compulsive gamblers and their families; third, costs of the Administrator of Racing and racing inspectors referenced in Chapters 100 and 101 of Title 3; and fourth, the remainder shall be paid into the State's General Fund.

(3) *Application of remaining proceeds.* — The proceeds remaining after payments as set forth in paragraphs (1) and (2) of this subsection shall be applied as follows:

a. Additional State Proceeds. — The State shall receive an additional 12.27% of the proceeds remaining after payments made under paragraph (1) of this subsection from the proceeds attributable to licensees which conducted 40 or fewer (but at least 1) days of live harness horse races during 1992, 12.59% of such proceeds

of licensees which conducted more than 40 days of live harness racing during 1992 or which conduct thoroughbred racing under Title 28, and 12.73% of such proceeds of licensees which conduct thoroughbred horse racing pursuant to Chapter 101 of Title 3. From these proceeds, the State shall pay for all costs of equipment (both video lottery machines and related equipment), whether leased or owned by the State, used or under the control of such agent and the cost of the central computer used to monitor the equipment used by the agent. The State shall also pay $1,000,000 of the proceeds received under this section from licensees under this chapter which conduct live harness horse racing to fund the State's contribution to the Delaware Standardbred Breeder's Program. Said amount is to be allocated equally as of January 1st of the calendar year among existing licensees which conduct live harness horse racing, but moneys shall not be expended for the program until such time as a plan has been approved pursuant to subparagraph (b)(3)b.2.D. of this section. Moneys remaining after payment of all costs of equipment and central computer monitoring shall be deposited to the General Fund of the State.

* * *

b. Purses.

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2. For video lottery agents licensed only to conduct harness racing meets under Chapter 100 of Title 3, such agents shall be paid and shall pay additional purses (and related administrative expenses of the horse racing association) to be applied under the direction of the Delaware Harness Racing Commission to purses for races conducted at such agent's racetrack in accordance with § 10048 of Title 3, in an amount calculated as follows:

A. Where the average daily win (the amount remaining after all payments to players) for the preceding calendar year is less than or equal to $25,000 per day, the agent shall pay an amount equal to 10% of the proceeds remaining after payments made under subsections (b)(1), (b)(2) and (b)(3)a. of this section.

B. Where the average daily win for the preceding calendar year is greater than $25,000 and less than or equal to $50,000, the agent shall pay 10% of the first $25,000 in proceeds remaining after payments made under subsections (b)(1), (b)(2) and (b)(3)a. of this section, and 20% of such remaining proceeds in excess of $25,000.

C. Where the average daily win for the preceding calendar year is greater than $50,000, the agent shall pay 20% of the proceeds remaining after payments made under subsections (b)(1), (b)(2) and (b)(3)a. of this section. During the 1st year of operation, the additional purses will be based upon the average daily win for the then current year.

D. $1,000,000 of those proceeds, which would otherwise fund purses, on an annual basis ($500,000 to come from each licensee which conducts live harness horse racing) to be set aside for purses under subsection (b)(3)b.2. of this section shall be used to fund a Delaware Standardbred Breeder's Program which shall be administered by a board comprised of 4 members from the Delaware Standardbred Owners Association, 1 member from the Standardbred Breeders and Owners of Delaware, Inc., 1 member from each video lottery agent licensed to conduct harness racing meets under Chapter 100 of Title 3, 1 member appointed by the Speaker of House of the General Assembly, 1 member appointed by the President Pro Tempore of the Senate of the General Assembly, the Secretary of Agriculture or the Secretary's designee, and the Secretary of Finance or the Secretary's designee. Members shall be chosen by the organizations they represent, and shall serve 4-year terms except that 4 of the initial board selected by the

members of the Delaware Standardbred Owners Association shall serve an initial term of 2 years, and 4 years thereafter. The board created hereunder will present a plan for the adminis-tration of the Program to the General Assembly no later than May 15, 1999. This plan, and all subsequent amendments to the plan, shall be subject to the written approval of the Secretary of Agriculture or the Secretary's designee, the Chairman of the Delaware Harness Racing Commission or the Chairman's designee, and the Secretary of Finance or the Secretary's designee. The board shall transmit minutes of all meetings and any proposed actions to the Delaware Harness Racing Commission within 10 days after each meeting. The board shall transmit an annual report detailing the allocation of proceeds from the fund and make available to the State Auditor or the State Auditor's representative such information as may be required to perform an annual audit of funds allocated from the Delaware Standardbred Breeder's Program. In addition to funding special purses for Delaware Standardbred horses, the Board created hereby may also use the funds dedicated to this program for advertising, promotion, educational and administrative purposes. Funds dedicated to the Delaware Standardbred Breeder's Program shall not be subject to the 1-year payout requirement of § 10048 of Title 3.

3. For video lottery agents licensed to conduct harness horse racing meets under Chapter 100 of Title 3 on January 1, 1993, such agents, which in the future also conduct horse racing meets under Chapter 101 of Title 3 or Chapter 4 of Title 28, shall be paid and shall pay additional purses (and related administrative expenses of the horse racing association) administered by either the Delaware Thoroughbred Racing Commission or the Delaware Harness Racing Commission, as appropriate, in accordance with the formula set forth in sub-subparagraph 2. of this subparagraph, for races conducted at such agent's racetrack based on the ratio of live horse racing days to total live racing days and live harness horse racing days to total live racing days.

* * *

d. Commissions to agents. — The portion of such proceeds remaining after the payments required by subparagraphs a., b. and c. of this paragraph shall be paid to such video lottery agent as commission.

Appendix G

DELAWARE CODE
TITLE 29. STATE GOVERNMENT
PART IV. STATE AGENCIES AND OFFICES NOT CREATED BY CONSTITUTION
CHAPTER 48. LOTTERIES
SUBCHAPTER I. STATE LOTTERY

29 Del.C. § 4819

§ 4819. Restrictions on location and use of video lottery machines

(a) Video lottery machines shall only be located within the confines of an existing racetrack property in this State on which was conducted in 1993 either a horse racing meet pursuant to Title 3 or Title 28 or a harness horse racing meet pursuant to Title 3; and provided further, that video lottery machines shall not be located in a hotel, motel or other overnight sleeping facility.

(b) In respect of any pari-mutuel harness racing or pari-mutuel horse racing property the racing operations on which were lawful under any county or municipal zoning ordinance as of January 1, 1993, the use of video lottery machines on such property pursuant to the provisions of this act shall not be deemed to change the character of such lawful land use and such use of video lottery machines shall not be prohibited by any such county or municipal zoning ordinance, including amendments thereto.

(c) Video lottery machines shall be connected to the Lottery's central computer system, and shall not be available for play on Christmas, Easter or between the hours of 2:00 a.m. and 1:00 p.m. on Sundays, or between the hours of 2:00 a.m. and 8:00 a.m. on all other days.

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29 Del.C. § 4820

§ 4820. Rights and obligations of director and video lottery agent relating to video lottery machines

(a) All video lottery machines shall be owned or leased by the State and shall be obtained from manufacturers licensed under § 4805(a)(17) of this title. All video lottery machines shall be leased or purchased under the procedures set forth in § 6922 of this title. Any video lottery agent must file with the Director a copy of any current or proposed agreement or disclose any other relationship between the agent, its parents, subsidiaries, related entities, directors, officers or key employees for the sale, lease, maintenance, repair or other assignment to the agent's facility of video lottery machines, or any other relationship with any vendor, manufacturer or other party which stands to benefit financially from the possession or use of video lottery machines by such agent. Failure to file such information shall constitute grounds for the revocation or suspension of a license.

(b) Upon submission by a video lottery agent of a proposed plan for the lease or purchase of video lottery machines in accordance with procedures to be established by the Director, the Lottery Director shall lease or purchase the number, type and kind of video lottery machines necessary for the efficient and economical operation of the Lottery, or the convenience of the players and in accordance with the plan of the licensee, provided that no more than 1,000 video lottery machines shall be located within the confines of a racetrack property unless the Director approves up to an additional 1,000 for each racetrack property, and further provided that the Director may amend such plan where the Director finds that such amendments are necessary to increase revenues, provided such amendments do not produce reductions in the overall net proceeds from the video lottery, protect the public welfare or ensure the security of the video lottery. The Director's lease or purchase of video lottery machines under this subsection shall be pursuant to the procedures used for procurement under §§ 6981 and 6982 of this title.

(c) Each video lottery agent shall be responsible for the security and safekeeping of the video lottery machines of which it has physical custody.

(d) The Director shall contract with an independent laboratory to test video lottery machines and related equipment on a periodic

basis to ensure that the machines and equipment comply with the requirements of this chapter and any other applicable standards and regulations. The manufacturer, vendor or lessor of such machines and equipment shall pay all costs associated with such testing.

(e) Each video lottery agent shall hold the Director and this State harmless from and defend and pay for the defense of any and all claims which may be asserted against the Director, the State or the employees thereof, arising from the participation in the video lottery system; specifically excluding, however, any claims arising from the negligence or willful misconduct of the Director, the State or the employees thereof.

(f) Each video lottery agent shall provide access to all records of the licensee and the physical premises of the business or businesses where the video lottery agent's video lottery activities occur for the purpose of monitoring or inspecting the video lottery agent's activities and the video lottery games, video lottery terminals and associated equipment. None of the information disclosed pursuant to this subsection shall be subject to disclosure under the Freedom of Information Act, §§ 10001-10005 of this title.